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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

QUENTIN ROGERS, RAY DELAIGLE, ROBERT L. WEBSTER, CHARLES H. KITCHENS, AND THOMAS M. LOVETT, AS MEMBERS OF THE BOARD OF COMMISSIONERS OF BURKE COUNTY, GEORGIA, AND A. HOLLAND GNANN, OTTO V. JOHNSON AND WALL T. THOMPSON, AS MEMBERS OF THE BOARD OF ELECTIONS OF BURKE COUNTY, GEORGIA,

Appellants,

versus

HERMAN LODGE, SHELLEY COLEMAN, LIZZIE M. SAMS, K. C. CHILDERS, REV. DAVID NELSON, TALMADGE D. LODGE, WOODROW HARVEY AND LEVI CRAWFORD,

Appellees.

Appeal from the United States Court of Appeals
For the Fifth Circuit

STATEMENT AS TO JURISDICTION

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STATEMENT AS TO JURISDICTION

In compliance with Rules 13 and 15 of this Court, Quentin Rogers, et al., Appellants, submit herewith

this statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment and decision of the United States Court of Appeals for the Fifth Circuit, entered March 20, 1981, affirming the judgment of the United States District Court for the Southern District of Georgia, Augusta Division, entered September 29, 1978 (Findings of Fact and Conclusions of Law filed October 26, 1978), which (1) declared unconstitutional an Act of the General Assembly of Georgia (Ga. Laws 1911, p. 390) providing for the election at-large of the five (5) members of the Board of Commissioners of Burke County, Georgia; (2) ordered the terms of the five incumbents cut short; and (3) ordered that a special election be held for the election of five (5) Commissioners from five, single-member districts pursuant to a plan proposed by plaintiffs and approved by the district court.

QUESTIONS PRESENTED

(1) Whether the Court of Appeals erred in construing this Court's decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), as holding that proof of the voting dilution criteria of *Zimmer v. McKeithen*, 485 F.2d 1297 (C.A. 5th 1973), is still sufficient to establish an *inference* of purposeful discrimination in the retention of an at large voting system in effect since 1911, found by the district court below to have been "racially neutral" when adopted, and that the only effect of *Bolden* is to hold that the *Zimmer* criteria are no longer sufficient to

establish a *presumption* of purposeful discrimination in the retention of the at large system?

(2) Whether the Court of Appeals also erred in holding that another aspect of *Bolden* is to require courts in voting dilution cases to attribute controlling significance to the question whether the political body in issue has been unresponsive to the needs of the black community, contrary to the principle that courts can not resolve purely political questions for which judicially manageable standards are lacking?

(3) Whether the Court of Appeals erred in holding that plaintiffs had carried the burden of proving a case of purposeful discrimination in the retention by Burke County of its at-large system of electing its five county commissioners, based upon evidence of the *Zimmer* criteria, no stronger than that held insufficient in *Bolden*, plus a finding of a "depressed socio-economic status" affecting blacks in Burke County? Embraced within the foregoing is the subsidiary question as to whether the action of the Court of Appeals is tantamount to invalidating an at large plan without requiring a showing of purposeful discrimination.

(4) Whether the Court of Appeals erred in holding that a case of unconstitutional vote dilution arising from an at large system of election can be established under the Fifteenth Amendment?

(5) Whether the doctrine of unconstitutional dilution of voting rights arising from an at large election system is applicable to county governing bodies?

(6) Whether, assuming that even after *Bolden*, the *Zimmer* criteria are still sufficient to give rise to an inference of purposeful discrimination as held by the Court of Appeals below, the finding in this case is nevertheless clearly erroneous on the evidence presented?

(7) Whether, even assuming that the existing at large plan was unconstitutional, the district court below erred in ordering into effect a single member districting plan submitted by plaintiffs, deliberately gerrymandered to favor plaintiffs, in lieu of a plan submitted by defendants, without having first found and declared the defendants' plan to be invalid and insufficient in law, and without having afforded defendants an opportunity to submit their plan for preclearance under Section 5 of the Voting Rights Act, 42 USCA 1973c, contrary to the decisions in *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978), and *Berry v. Doles*, 438 U.S. 190 (1978).

PARTIES TO THE PROCEEDING

The parties to this proceeding are stated in the caption.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ii

PARTIES TO THE PROCEEDING iv

TABLE OF CONTENTS v

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

STATE STATUTE INVOLVED 2

STATEMENT OF THE CASE 3

THE QUESTIONS ARE SUBSTANTIAL 9

(1) For At Least The Fourth Time, The Court Of Appeals For The Fifth Circuit Has Refused In Voting Dilution Cases, To Follow The Decisions Of This Court 9

(2) The Decision Of The Court Of Appeals Is In Conflict With Another Decision Of The Same Court 16

(3) In According Controlling Significance To Whether Governing Authorities Are Responsive To Black Needs, The Court Below Has Sanctioned Judicial Resolution Of Essentially Political Questions 17

TABLE OF CONTENTS (Continued)

Page

(4) The Court's Finding Of A Depressed Socio-Economic Status Adds No Support To The Finding Of Dilution 19

(5) A Case Of Unconstitutional Dilution Of Black Voting Rights Was Not Established Here 22

(6) The Fifteenth Amendment Does Not Reach A Voting Dilution Case 26

(7) The Dilution Doctrine Does Not Apply To County Governing Bodies 27

(8) The Courts Below Erred In Ordering Into Effect A Plan Proposed By Plaintiffs Without Having Found Defendants' Plan To Be Invalid And Having Permitted Defendants To Submit It Under Section 5 Of The Voting Rights Act 28

CONCLUSION 28

APPENDIX A 1a

APPENDIX B 61a

APPENDIX C 99a

TABLE OF AUTHORITIES

CASES: Page

Ausberry v. City of Monroe, 456 F.Supp. 460 (D.C. La. 1978) 15

Baker v. Carr, 369 U.S. 186 (1962) 18

Berry v. Doles, 438 U.S. 190 (1978) iv,28

Blacks United For Lasting Leadership v. Shreveport, 571 F.2d 248 (C.A. 5th 1978) ..13,15

Bolden v. City of Mobile, 423 F.Supp. 384 (D.C. Ala. 1970) 23

Bolden v. City of Mobile, 571 F.2d 238 (C.A. 5th 1978) 7,10,13,15,22

Boyle v. Wells, 103 F.2d 237 (C.A. 6th 1939), cert. den. 308 U.S. 579 30

Calderon v. McGee, 584 F.2d 66 (C.A. 5th 1978) 15

Cipriano v. Houma, 395 U.S. 701 (1969) 20

Cooper v. Aaron, 358 U.S. 1 (1958) 14

Corder v. Kirksey, 585 F.2d 708 (C.A. 5th 1978) 15

Criterion Club of Albany v. Commrs. of Dougherty County, 594 F.2d 118 (C.A. 5th 1979) 15

Cross v. Baxter, 604 F.2d 875 (C.A. 5th 1979) ...15

Cross v. Baxter, 639 F.2d 1383 (C.A. 5th 1981) ..15

TABLE OF AUTHORITIES (Continued)

Page

David v. Garrison, 553 F.2d 923 (C.A. 5th 1977) 15

East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976) 6,10

Engleman v. Cahn, 425 F.2d 954 (C.A. 2nd 1969), cert. den. 397 U.S. 1009 30

Ex Parte Howard, 9 Wall. 175 (1870) 14

Ex Parte Milligan, 4 Wall. 2 (1866) 30

Hendrix v. McKinney, 460 F.Supp. 626 (D.C. Ala. 1978) 15

Hill v. Stone, 421 U.S. 289 (1975) 20

Kirksey v. Board of Supervisors of Hinds County, 554 F.2d 139 (5th Cir. 1977) 7,15

Kirksey v. City of Jackson, 625 F.2d 21 (C.A. 5th 1980) 15,23

Kirksey v. City of Jackson, 506 F.Supp. 491 (D.C. Miss. 1981) 15

Levin v. Mississippi River Fuel Corp., 386 U.S. 162 30

Lodge v. Buxton, 639 F.2d 1358 (C.A. 5th 1981) 1,8,9,22

McIntosh County NAACP v. City of Darien, 605 F.2d 753 (C.A. 5th 1979) 15

TABLE OF AUTHORITIES (Continued)

Page

McMillan v. Escambia County, 638 F.2d 1239 (C.A. 5th 1981) 16,27

Milliken v. Bradley, 418 U.S. 717 (1974) 26

Mobile, City of, v. Bolden, 446 U.S. 55 (1980) .*passim*

Moore v. Brown, 65 L.Ed.2d 1158 (1980) 12

Nevett v. Sides, 533 F.2d 1361 (C.A. 5th 1976) 12,15

Nevett v. Sides, 571 F.2d 209 (C.A. 5th 1978) .*passim*

New Orleans, City of, v. Dukes, 427 U.S. 297 (1976) 2

New York, etc., R. Co. v. Henagan, 364 U.S. 441 (1960) 30

Paige v. Gray, 538 F.2d 1108 (C.A. 5th 1976) 15

Parnell v. Rapides Parish School Board, 563 F.2d 180 (C.A. 5th 1977) 15

Rogers v. Lodge, 439 U.S. 948 (1978) 8

Sanchez v. McDaniel, 615 F.2d 1023 (C.A. 5th 1980) 28

Thomasville Branch, NAACP v. Thomas County, 571 F.2d 257 (C.A. 5th 1978) 13,15

United States v. Georgia, 436 U.S. 941 (1978) 5

United States v. Supervisors of Forrest County, Mississippi, 571 F.2d 951 (C.A. 5th 1978) 15

TABLE OF AUTHORITIES (Continued)

Page

United States v. Uvalde School District, 625 F.2d 547 (C.A. 5th 1980) 12,16,27

Voter Information Project v. Baton Rouge, 612 F.2d 208 (C.A. 5th 1980) 15

Wallace v. House, 538 F.2d 1138 (C.A. 5th 1976) 15,30

Washington v. Davis, 426 U.S. 229 (1976) .. 7,10,29

Whitcomb v. Chavis, 403 U.S. 124 (1971) 26

White v. Regester, 412 U.S. 755 (1973) 18,21

Wise v. Lipscomb, 437 U.S. 535 (1978) iv,27,28

Zimmer v. McKeithen, 485 F.2d 1297 (C.A. 5th 1973) ..... *passim*

CONSTITUTIONAL PROVISIONS:

Georgia Constitution, §2-5302 25

Georgia Constitution, §2-5501 25

STATUTES:

Ga. Code §23-101 3

Ga. Code §23-803 4

Ga. Code §34-1015 4

Ga. Code §34-1413 4

Ga. Laws 1911, p. 390, 391 ..... ii, 1-4

Ga. Laws 1929, p. 548 3

Ga. Laws 1931, p. 400 3

TABLE OF AUTHORITIES (Continued)

Page

Ga. Laws 1964, Ex. Sess., pp. 26, 174 4

Ga Laws. 1970 Vol. I, pp. 347, 380, 369 4,5

Ga. Laws 1975 Vol. II, p. 4506 3,5

28 USCA 1254(2) 2

42 USCA 1973c iv,5,28

42 USCA 1983 1

MISCELLANEOUS:

87 Harv. L.R. 1851, 1857 (1974) 27,29

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OPINIONS BELOW

The opinion of the district court below is not reported, but is appended hereto as "Appendix B". The decision of the Court of Appeals affirming the decision of the district court is reported as *Lodge v. Buxton*, 639 F.2d 1358 (C.A. 5th 1981). A copy is appended hereto as "Appendix A".

JURISDICTION

This action was brought by Appellees, plaintiffs below, in the United States District Court for the Southern District of Georgia, Augusta Division, pursuant to 42 USCA 1983, attacking the constitutionality of an act of the General Assembly of Georgia approved August 21, 1911 (Ga. Laws 1911, p. 390), which created a Board of Commissioners as the governing authority of Burke County, Georgia, and provided for the county-wide election of the five Commissioners. Plaintiffs contended that the at-large election of the Commissioners constituted a dilution of the voting rights of black voters in violation of the First, Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States. After trial, the district court entered order granting the relief prayed for on September 29, 1978, holding the county-wide voting law to be unconstitutional, and ordering that new elections be held in November, 1978, to elect five new commissioners from single member districts according to a districting plan presented by plaintiffs. The Court of Appeals affirmed, on March 20, 1981, with Judge Henderson dissenting. The jurisdiction of the Supreme Court to review

this decision on appeal is conferred by 28 USCA 1254(2), the Courts below having held a Georgia statute to be unconstitutional as being repugnant to the Constitution of the United States. Appellants did not file a motion for rehearing. Appellees filed a motion for rehearing directed only to an error in the opinion of the Court of Appeals reciting an incorrect population figure for Burke County. This motion was granted by order entered April 8, 1981 "as to the typographical errors." Notice of Appeal was filed March 25, 1981 in the Court of Appeals for the Fifth Circuit. Cases sustaining the jurisdiction of this Court on appeal are *City of Mobile v. Bolden*, 446 U.S. 55, 64 L.Ed.2d 47 (1980), and *City of New Orleans v. Dukes*, 427 U.S. 297, 49 L.Ed.2d 511 (1976).

STATE STATUTE INVOLVED

"That from and after the passage of this Act, there shall be created and established a Board of Commissioners of Roads and Revenues for the County of Burke in the State of Georgia, consisting of five persons who shall be elected by the qualified voters of said county at the general election to be held on the first Wednesday in October in the year 1912, and at each subsequent, alternate, general election, which election shall be held under the rules, regulations and laws governing the election of county officers in the county of Burke and said five persons shall possess the qualification of being resident freeholders of said County for at least three years prior to said election, shall be at least 28 years of age and eligible to election as a member of

the General Assembly of the State of Georgia." (Ga. Laws 1911, pp. 390, 391).

STATEMENT OF THE CASE

This case, instituted on April 5, 1976, by eight black citizens of Burke County, Georgia, against the five Commissioners of Burke County and the County Board of Elections,[1] attacked as an unconstitutional dilution of black voting rights, the at large system of electing the five Commissioners of Burke County, which had been in effect by law since 1911 (Ga. Laws 1911, p. 390).[2]

Burke County is one of the 159 Counties of Georgia, Ga. Code §23-101. According to the 1970 Census, the county had 18,255 persons,[3] of whom 10,988, or 60.19%, were black. There were 4,909 white persons of voting age (18 and older) and 5,617 black persons of voting age in the county. Stated differently, blacks con-

---

1 The action originally was brought against the probate judge rather than the Board of Elections. On learning that the duty of conducting elections in Burke County had been transferred by statute from the Probate Judge to a "Board of Elections" (Ga. Laws 1975 Vol. II, p. 4506), the plaintiffs substituted the latter for the probate judge. Defendant Buxton, whose name appears in the style of the case as it appears in the Court below, was superseded on the Board by Mr. Rogers, who was substituted as a party defendant.

2 In 1929, the Act was amended to provide for appointment of the 5 commissioners by the grand jury in 1932 (Ga. Laws 1929, p. 548), but before the Act was ever put into effect, it was amended in 1931 so as to revert back to election by the people (Ga. Laws 1931, p. 400).

3 The chart in foot note 2 of the Court of Appeals' decision is in error, and was the subject of Appellees' Motion for Rehearing.

stituted 53.36% of the total voting age population. (P.E. 58). The black population appears to be declining each year (P.E. 192). In 1978, there were 6,373 persons registered to vote, of whom 2433 or 38%, were black (D.E. 57, R. 776).

Since 1911, the County has been governed by a board known as the "Board of Commissioners of Burke County." See Ga. Code §23-803. This board was created by the Act of 1911, and has remained in the same form to the present day. The Board consists of five (5) members, elected by all the voters of the County for four year terms. The County has never been divided into districts, either for the purpose of creating residency districts, or for the purpose of having the commissioners elected by the voters in the district. All five commissioners are elected at one time, the last elections having been held in 1980.

The Georgia Election Code of 1964 provided that in order to be nominated or elected, candidates were required to receive a majority of the votes cast in the primary or election, and in the event no candidates received a majority in the first primary or election, a runoff was required to be held (Ga. Laws 1964, Ex. Sess., pp. 26, 174). The same act also provided that where two or more public officers having the same title are to be voted on, each candidate must qualify for a specific post or position. (Id., p. 89). These provisions were re-enacted in 1970 (Ga. Laws 1970 Vol. I, pp. 347, 380, 369) and now appear as Code Sections 34-1413 and 34-1015, respectively, and were approved by the Attorney General of the United States under Section 5 of the Voting

Rights Act of 1965, 42 USCA 1973c. See *United States v. Georgia*, 436 U.S. 941 (1978).

So far as known, no black has ever served as a member of the Board of Commissioners.

Until 1976, all voters registered at the Court House, at the same office where they purchase auto tags and return their property for taxes (T. 801, 784, 722-3). On December 5, 1975, the Burke County Improvement Association, a black organization (T. 668), requested the Commissioners to establish additional registration sites (P.E. 102, T. 946), and the Commissioners responded by establishing three additional sites at Midville, Sardis and a country store, dispersed geographically over the County (T. 193, 733, 947, D.E. 4). There are 11 polling places in the County (T2. 102).

Until 1970, the county Democratic Executive Committee conducted primary elections in the County (T2. 99; R. 932). From 1970, the Probate Court (formerly Ordinary) conducted the primaries also (T. 932). See Ga. Laws 1970 Vol. I, p. 347. In 1975, the conduct of all elections was transferred to a three-man Board of Elections (T. 932). See Ga. Laws 1975 Vol. II, p. 4506. Segregation at the polls was abolished in 1964 (T. 933).

There was no evidence that the 1911 county-wide law was enacted with discriminatory intent or purpose, and plaintiffs appear to concede as much, pointing out that black voting had already been eliminated in Georgia on a statewide basis by an Act of 1908 (R. 152). The district court below held that the enactment of the 1911 Act was neutral (R. 776, 791). There was also no

evidence that blacks had any difficulty registering, voting or getting on the ballot in Burke County; indeed, the evidence was to the contrary (T. 93-6; 177, 322, 339, 356, 631, 710, 741, 765, 784, 804-6, 846, 851, 884-7, 932, 949-950; T2. 32, T2. 105, T2. 144). The Court also found to this effect (R. 788).

The district court held that a case of unconstitutional vote dilution had been made out under the criteria of *Zimmer v. McKeithen*, 485 F.2d 1297 (C.A. 5th 1973), aff'd. sub nom *East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976), "but without approval of the constitutional views expressed by the Court of Appeals."

The decision of the district court paid lip service to the proposition that purposeful discrimination must be shown, declaring that "a demonstration of intention is necessary under both fourteenth and fifteenth amendments as a requisite to a finding of unconstitutional vote dilution. . ." (Findings, p. 4) and that the county-wide voting act, when adopted in 1911, was not enacted with discriminatory intent, being characterized as "racially neutral when adopted. . ." (Findings, p. 7), and "neutral in origin. . ." (Findings, p. 22). Nevertheless, the Court below held the county-wide voting plan to be unconstitutional because ". . . [I]t is evident that the present scheme of electing county commissioners, although racially neutral when adopted, is being *maintained* for invidious purposes. Compare Bolden v. City of Mobile, 571 F.2d 238 (5th Cir. 1978)" (Findings, p. 7). In order to reach this conclusion that county-wide voting had been *maintained* for a discriminatory purpose, the district court purported to follow the prior deci-

sions applying the so-called *Zimmer* criteria: "Functionally, this added requirement has not changed the district court's task since a finding of racially discriminatory dilution under the Zimmer criteria raises an inference of intent, and therefore . . . a finding under the criteria satisfies the intent requirement. . . Nevett II, 571 F.2d at 217" (Findings, p. 5). Accepting this premise, the district court then proceeded to analyze the *Zimmer* primary and enhancing factors, and also another allegedly separate "similar" factor gleaned from *Kirksey v. Board of Supervisors of Hinds County*, 554 F.2d 139 (5th Cir. 1977), i.e., "a depressed socio-economic status" (Findings, pp. 6, 16). Relying on this analysis, the district court held that a case of unconstitutional dilution had been established.

This decision was rendered prior to this Court's decision in *City of Mobile v. Bolden*, supra, but after the Court of Appeals' decisions in *Nevett v. Sides*, 571 F.2d 209 (C.A. 5th 1978) and *Bolden v. City of Mobile*, 571 F.2d 238 (C.A. 5th 1978), recognizing that a showing of purposeful discrimination was now necessary in order to establish a case under the Fourteenth Amendment, but concluding that purposeful discrimination could still be inferred from the "impact or effect" type evidence previously held sufficient under *Zimmer* which had been developed prior to *Washington v. Davis*, 426 U.S. 229 (1976).

By way of relief, the district court ordered that a special election be held in the 1978 November General then shortly to be held at which five (5) new Commissioners would be elected from single-member districts according to a plan presented by plaintiffs. (The in-

cumbents had been elected in 1976). On November 3, 1978, this Court granted a stay "pending final disposition of the appeal to the United States Court of Appeals for the Fifth Circuit." *Rogers v. Lodge*, 439 U.S. 948 (1978).

On March 20, 1981, the Court of Appeals affirmed the judgment of the district court, with Judge Henderson dissenting. *Lodge v. Buxton*, 639 F.2d 1358 (C.A. 5th 1981).

To begin with, the majority opinion recognizes that the decision below must stand or fall on a finding of the "existence of a discriminatory purpose for the maintenance of such a system" (639 F.2d at 1363, f.n. 7). The majority then accuses this Court of misconstruing its 1978 decisions in *Nevett II* and *Bolden* (639 F.2d at 1368, f.n. 22). Having done this, and analyzed the spate of opinions in *Mobile v. Bolden*, supra, the majority concludes that *Bolden* has not really changed the law, except to this limited extent:

> (1) The *Zimmer* criteria are rejected only "to the extent that the Court, in Bolden, *presumed* the existence of a discriminatory purpose from the proof of some of those factors" (639 F.2d at 1373). Circumstantial evidence, including these factors may, however, be sufficient to give rise to an *inference* of discriminatory intent, as distinguished from a *presumption*. (639 F.2d at 1373-1381).
>
> (2) Regardless of how strong the other circumstantial evidence may be, however, a finding essential to showing a case of unconstitutional dilution is a showing of unresponsiveness by the

governing bodies in question to the needs of black citizens, for "The Supreme Court implicitly concluded in *Bolden*, as we explicitly do today, that absent such proof of unresponsiveness, a prima facie case can not be established. Zimmer has been rejected to the extent it holds otherwise." (639 F.2d at 1373).

The majority found additional circumstantial evidentiary support for its holding in the finding below of a depressed socio-economic status (639 F.2d at 1376).

Judge Henderson in dissent declares that *Mobile v. Bolden* has done more than reaffirm the necessity of a showing of discriminatory intent, for it has also abolished the "aggregate of factors approach of Zimmer v. McKeithen . . ."; that the same evidence held insufficient in *Mobile* was relied on by the district court below; and that the judgment should be vacated and remanded for reconsideration in the light of *Mobile*.

THE QUESTIONS ARE SUBSTANTIAL

(1) For At Least The Fourth Time, The Court of Appeals For The Fifth Circuit Has Refused In Voting Dilution Cases, To Follow The Decisions Of This Court

The unwillingness of the Court of Appeals to follow the decisions of this Court in voting dilution cases is unprecedented.

The principles under which the Court of Appeals has resolved voting dilution claims were originally formulated in *Zimmer v. McKeithen*, 485 F.2d 1297 (C.A. 5th

1973), aff'd sub nom. *East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976). *Zimmer* was decided prior to *Washington v. Davis*, 426 U.S. 229 (1976), and not unsurprisingly was based on a "discriminatory impact" rationale, for in that decision, the Court of Appeals stated "that designedly *or otherwise*, an apportionment scheme, under the circumstances of a particular case, *would operate* to minimize or cancel out the voting strength of racial or political elements to the voting population. . ." 485 F.2d at 1304 (emphasis supplied). Not only does the language "or otherwise" and "operate" connote impact or effect as distinguished from purpose, but an analysis of the *Zimmer* criteria themselves points toward the same conclusion, for the criteria at best give rise to an inference only as to how the voting arrangement *affects* a group, and says nothing of the intent or purpose with which it was adopted or retained. Indeed, only by assumption can it be said that the *effects* derive from the voting arrangement itself, for other factors may and often do cause the effects independently of the at large election system.

After *Washington v. Davis*, supra, the Court of Appeals had occasion to consider the question as to what effect the discriminatory intent or purpose requirement had made on the *Zimmer* criteria. That question was addressed in *Nevett v. Sides*, 571 F.2d 209 (C.A. 5th 1978), decided the same day as *Bolden v. City of Mobile*, 571 F.2d 238 (C.A. 5th 1978), the Court using the *Nevett* opinion as the vehicle for announcing the controlling principles applied to four dilution cases decided that day. Viewed in the light of *Washington v. Davis*, it should have been apparent that the *Zimmer* criteria no longer estab-

lished a prima facie case of dilution. The Court of Appeals held to the contrary, however.

First, the Court conceded that a showing of discriminatory purpose was now necessary. 571 F.2d at 219. Second, the Court conceded that language in *Zimmer* related to impact rather than to purpose: "The second avenue, however, seems to allow plaintiffs to succeed under a dilution rationale without establishing intentional discrimination" 571 F.2d at 225. Third, in what can be characterized only as an amazing process of reasoning, the Court concluded that the *Zimmer* criteria themselves had been utilized to establish an inference of discriminatory purpose: "We hold today that a finding of dilution under Zimmer raises an inference of intentional discrimination, and therefore the essential element of intent was present in each of these cases." 571 F.2d at 225. Apparently, the Court of Appeals and the district courts in all prior dilution cases had been finding discriminatory intent without realizing it! This holding, however, is precisely the proposition that *Bolden* rejected, on the ground that the *Zimmer* criteria all relate to impact or effect and not intent: "That approach, however, is inconsistent with our decision in Washington v. Davis, supra and Arlington Heights, supra. Although the presence of the indicia relied on in Zimmer may afford some evidence of a discriminatory purpose, satisfaction of those criteria is not itself sufficient proof of such a purpose" (64 L.Ed.2d at 62). Consequently, this is the first time that the Court of Appeals refused to follow the law as declared by this Court.

To the rational mind, this Court's holding in *Bolden* was clear and unambiguous. On remand of *Bolden*, however, both the district court and the Court of Appeals, without further findings on intent, reinstated the very district plan previously ordered in the Board of Education case under a *Zimmer* finding, and which this Court had vacated. When Mr. Justice Powell expressed "serious concerns about the process of reasoning underlying the District Court's entry of a preliminary injunction", but nevertheless denied a stay because of peculiar circumstances of timing, *Moore v. Brown*, 65 L.Ed.2d 1158 (Sept. 5, 1980), the Court of Appeals on remand expedited the appeal and vacated the judgment in part. Therefore, for the *second* time, the Court of Appeals refused to respect a decision of this Court, and only finally did so reluctantly after a strongly worded opinion by Mr. Justice Powell.

Later, in *United States v. Uvalde School District*, 625 F.2d 547 (C.A. 5th 1980), the Court reiterated again its belief that its reasoning in *Bolden* and *Nevett* "survives the Supreme Court's decision intact" (625 F.2d at 553). This was the *third* time.

Now, for the *fourth time*, the Court of Appeals has refused to follow the decisions of this Court. It has done so by resorting to a facile distinction based upon the difference between an inference and a presumption, a distinction not supported in the least by this Court's decision in *Bolden*. The majority opinion asserts the startling proposition that the only change wrought by this Court's decision in *Bolden* regarding the *Zimmer* criteria is that they now only permit an *inference* of discrimina-

tory purpose to be drawn, whereas before, these criteria gave rise to a mandatory *presumption*. As stated by the Court: "We conclude that they rejected the use of the Zimmer criteria to the extent that this Court, in Bolden, *presumed* the existence of a discriminatory purpose from the proof of some of those factors (639 F.2d at 1373) * * * Appellant contends that, in light of Bolden, the use of the Zimmer criteria to draw an inference of intent is erroneous. Such a broad absolute reading of Bolden seems unwarranted and incorrect (639 F.2d at 1374). * * * Those (Zimmer) factors are relevant only to the extent that *they allow the trial court to draw an inference of intent*" (639 F.2d at 1375). The statement stands square in the face of a reference in *Nevett* that the *Zimmer* criteria "raises an inference of intent" (571 F.2d at 217), and the statement in *Bolden* that "the district court's findings are not clearly erroneous and that these findings amply support the *inference* that Mobile's at-large system unconstitutionally deprecates the value of the black vote" (571 F.2d at 245). We search in vain for any reference in *Nevett, Bolden, Blacks United For Lasting Leadership v. Shreveport*, 571 F.2d 248 (C.A. 5th 1978) and *Thomasville Branch v. Thomas County*, 571 F.2d 257 (C.A. 5th 1978), to the proposition that the *Zimmer* criteria gave rise to any presumption.

In short, the Court of Appeals is back in business at the same old "discriminatory impact" *Zimmer* stand. For the fourth time, a panel of that Court appears unwilling to respect the decisions of this Court.

Despite the fact that the decision of the district court here was rendered prior to *Bolden*, once again, the Court

of Appeals, in a remarkable coincidence, finds that the district judge anticipated the very decision of this Court 2 years later in *Bolden*, to wit: "A court that correctly anticipated how the intent requirement in those cases would be applied to voting dilution cases, as in Bolden, could correctly interpret and apply the law, without the benefit of the Supreme Court's recent opinion. This is precisely the type of foresight demonstrated by Judge Alaimo in the present case." (639 F.2d at 1375-1376). Thus, Judge Alaimo has been elevated to "seer" status by the Court below.

Over 100 years ago, this Court declared "Undoubtedly, it is the duty of all inferior courts to yield a prompt obedience to the mandate of this Court. . ." *Ex Parte Howard*, 9 Wall 175, 182 (1870), and more recently, observed that its decisions interpreting the Constitution stand as the "supreme law of the land", binding on all. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

There can be no greater manifestation of substantiality than that one of the Courts of Appeals seems unable or unwilling to follow the decisions of this Court time after time after time. Added to this is the fact that the dilution doctrine as applied under the *Zimmer* approach represents a drastic intervention into the political affairs of the states, and has been utilized by the Court of Appeals for the Fifth Circuit as a roving commission to restructure local governments so as to insure proportionate racial representation for no reason other than the beliefs of judges that this is the only way representative government can be achieved. One has only to take note of the many reported decisions where

the Court of Appeals and district courts have ordered reorganization of local governing bodies. See *Paige v. Gray*, 538 F.2d 1108 (C.A. 5th 1976); *Wallace v. House*, 538 F.2d 1138 (C.A. 5th 1976); *Parnell v. Rapides Parish School Board*, 563 F.2d 180 (C.A. 5th 1977); *Kirksey v. Board of Supervisors*, 554 F.2d 139 (C.A. 5th 1977), cert. den. 54 L.Ed.2d 454 (1977); *David v. Garrison*, 553 F.2d 923 (C.A. 5th 1977); *Nevett v. Sides*, 533 F.2d 1361 (C.A. 5th 1976); *United States v. Supervisors of Forrest County, Mississippi*, 571 F.2d 951 (C.A. 5th 1978); *Nevett v. Sides*, 571 F.2d 209 (C.A. 5th 1978); *Bolden v. City of Mobile*, 571 F.2d 238 (C.A. 5th 1978); *Blacks United v. Shreveport*, 571 F.2d 248 (C.A. 5th 1978); and *Thomasville Branch, NAACP v. Thomas County*, 571 F.2d 257 (C.A. 5th 1978); *Ausberry v. City of Monroe*, 456 F.Supp. 460 (D.C. La. 1978); *Calderon v. McGee*, 584 F.2d 66 (C.A. 5th 1978); *Corder v. Kirksey*, 585 F.2d 708 (C.A. 5th 1978); *Hendrix v. McKinney*, 460 F.Supp. 626 (D.C. Ala. 1978); *Criterion Club of Albany v. Commrs. of Dougherty County*, 594 F.2d 118 (C.A. 5th 1979); *McIntosh County NAACP v. City of Darien*, 605 F.2d 753 (C.A. 5th 1979); *Cross v. Baxter*, 604 F.2d 875 (C.A. 5th 1979); S.C., 639 F.2d 1383 (C.A. 5th 1981); *Voter Information Project v. Baton Rouge*, 612 F.2d 208 (C.A. 5th 1980); *Kirksey v. City of Jackson*, 625 F.2d 21 (C.A. 5th 1980); S.C., 506 F.Supp. 491 (D.C. Miss. 1981). These are the only *reported* cases. There are many more district court decisions restructuring local government bodies which have never been reported. In *Kirksey v. Board of Supervisors*, supra, the *en banc* Court held that racially gerrymandered districting was mandated in plans designed as a remedy for existing election schemes found to be unconstitutional under the dilution doctrine (554 F.2d at 151).

Armed with the *Zimmer* criteria, the Court of Appeals conceives it to be its mission to effectuate a second Reconstruction. This Court should act promptly and firmly to end this exercise in political intervention.

(2) The Decision Of The Court Of Appeals Is In Conflict With Another Decision Of The Same Court

Not only does the decision below fail to follow the controlling decisions of this Court, it is in direct conflict with a decision of another panel of the same court decided one month earlier. In *McMillan v. Escambia County*, 638 F.2d 1239 (C.A. 5th 1981), another panel of the Fifth Circuit, reached exactly the opposite result, declaring that "*Zimmer v. McKeithen* has been invalidated by *Bolden*," 638 F.2d at 1247, f.n. 16, and that the *Zimmer* factors of whether whites campaign for black votes and whether people in elective positions are responsive to minority needs, are no longer relavant, 638 F.2d at 1248. The *McMillan* case, it is submitted, represents the proper approach to dilution cases, for it focuses upon whether (1) There was evidence of discriminatory intent in enactment, and (2) Whether subsequent thereto efforts to change the law were defeated by racially inspired arguments.

Also, in *United States v. Uvalde School Dist.*, 625 F.2d 547 (C.A. 5th 1980), one panel of the Court of Appeals held that the 15th amendment reaches a dilution claim, whereas another panel held to the contrary in the *McMillan* case, supra.

(3) In According Controlling Significance To Whether Governing Authorities Are Responsive To Black Needs, The Court Below Has Sanctioned Judicial Resolution Of Essentially Political Questions

One of the original *Zimmer* criteria was stated to be "the unresponsiveness of legislators to their particularized interests." 485 F.2d at 1305. As stated, this was one of the four primary criteria. The decision of the Court below now elevates it to controlling significance, for the Court declares:

> "Finally, it appears that the Supreme Court has somewhat increased the burden of proof on plaintiffs in such cases. In Zimmer, this Court granted relief despite the factual conclusion that the police juries and school board in question were not unresponsive to the needs of the Black community. The Supreme Court implicitly concluded in Bolden, as we explicitly do today, that absent such proof of unresponsiveness a prima facie case can not be established. (639 F.2d at 1373-4)
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> * * * * * *
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> "Unresponsiveness is a necessary element to a plaintiff's maintenance of an action such as this." (639 F.2d at 1374).

To begin with, nothing in this Court's decision in *Bolden* supports this part of the Court of Appeals' decision. To the contrary, the plurality opinion observed that black citizens discriminated against in jobs and other benefits had their remedies by suing directly for

the benefit involved, 64 L.Ed.2d 62, and that "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful". (64 L.Ed.2d at 63).

In this case, plaintiffs launched an exhaustive inquiry into every resolution, vote, program, appropriation, road paving and response made by the Burke County Commissioners during the last 40 years. Some 289 exhibits were introduced by plaintiffs, most of which addressed this issue. The district court's findings devoted some 5 pages to it, (R. 780-784), ranging from committee appointments and road pavings to rejection of federal aid programs benefitting black citizens. While there well may be some language in *White v. Regester*, 412 U.S. 755, 769 (1973) supporting the responsiveness issue, neither this Court nor any lower Court has yet confronted the issue whether judicial inquiry into such a question is precluded by the political question doctrine. If there is anything left of this doctrine, it is difficult to see how any question could be more political in nature, as involving "policy determinations for which judicially manageable standards are lacking." *Baker v. Carr*, 369 U.S. 186, 226 (1962). Not only must a court resolve the controversial and partisan question as to what are the legitimate expectations of various segments of the population, but the Court must also adjudicate such questions as priorities, validity of compromises, and whether failure to grant a particular deserved benefit was nevertheless justified for other reasons. Whether a legislative body is responsive or unresponsive to legitimate needs of the people is

the very question which under our system of government is reserved to the voters. A federal court composed of judges elected by no one and enjoying life tenure is hardly such a broadly-based democratic institution as should be entrusted with such choices.

(4) The Court's Finding Of A Depressed Socio-Economic Status Adds No Support To The Finding Of Dilution

Conceding that the district court's decision below was rendered prior to this Court's decision in *Bolden* holding the *Zimmer* criteria to be insufficient, the Court of Appeals gives as one additional reason for its affirmance, the fact that the district court also relied on another factor, a depressed socio-economic status. The Court declared:

> "In its order the District Court said, 'It must be remembered that the Court is not limited in its determination to the Zimmer factors, rather the Court may consider the Zimmer factors, "or similar ones". Kirksey v. Board of Supervisors of Hinds County, 554 F.2d at 143. One "similar factor" considered in Kirksey which did not seem to be an explicit primary factor in the Zimmer formula, is a depressed socio-economic status, "which makes participation in community processes difficult." Id. This is an important factor and must be considered here.' Order at 6. On the basis of these statements, as well as the District Court's detailed analysis of the Kirksey factors, we conclude that the District Court did not treat the Zimmer cri-

teria as absolute, but rather considered them only to the extent they were relevant to the question of discriminatory intent." (639 F.2d at 1376).

At pages 1378-1379, the Court reviewed the evidence relied on by the district court as to this factor.

To begin with, this Court has never held that just because an identifiable segment of the population is disadvantaged economically or socially as compared to another group, this entitles the former to some special dispensation in the area of voting rights. Of course, a citizen can not be deprived of the right to vote because he owns no property. *Cipriano v. Houma*, 395 U.S. 701 (1969); *Hill v. Stone*, 421 U.S. 289 (1975). The question here, of course, is not whether poverty or social deprivation can be penalized, but whether the state is required to discriminate in favor of its victims because of it.

With respect to the matter at issue here, blacks are not the minority. They constitute 60.19% of the total population according to the 1970 census, and 53.39% of the voting age population. In Burke County, they have only to register and vote, and they could control all elections. The undisputed evidence here is that blacks have suffered no difficulty in registering, voting or running for office. Every witness presented by plaintiffs, without exception, testified to this effect.

Moreover, a depressed socio-economic status is at best simply more of the "impact" or "effect" type evidence which the Court of Appeals seems to be so preoccupied with. Even here, it is a long jump to infer dis-

crimination in political access from the fact that one group has less money or social standing than another.

Lastly, the fact of a depressed socio-economic status seems to be but one part of the *Zimmer* primary factor which deals with whether "the existence of past discrimination in general precludes the effective participation in the election system." *Zimmer*, supra, 485 F.2d at 1305. Consequently, it is more properly treated as one constituent element of this primary factor, and should not be elevated to separate status in order artificially to bolster an otherwise deficient evidentiary showing. This very approach has characterized the application of the *Zimmer* criteria by the Court of Appeals. In this respect, it should be recalled that two of the criteria deal with "access to the process of slating candidates" and whether "the existence of past discrimination in general precludes the effective participation in the election system" (485 F.2d at 1305). As utilized by the Court of Appeals, the latter factor has tended to gobble up the former, and a finding on the latter is also taken as establishing the former. In this case as in *Bolden*, the Court of Appeals was confronted with the undisputed fact that blacks do have equal access to the slating of candidates in the sense that this term was utilized in *White v. Regester*, 412 U.S. 755, 766-7.[4] Confronted also with the fact that no such evidence existed in either this case or the *Mobile* case, the

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4 Referring to the district court findings, this Court in White v. Regester alluded to the fact that only 2 Negroes had ever been "slated by the Dallas Committee for Responsible Government (DCRG), a white dominated organization that is in effective control of Democratic Party slating in Dallas County." (Id.).

Court of Appeals nevertheless resolved the slating factor in favor of plaintiffs by referring to past discrimination and its alleged inhibiting effects on present participation. *Bolden*, supra, 571 F.2d at p. 243; *Lodge v. Buxton*, supra, 639 F.2d at 1379. In the plurality opinion in *Bolden*, this inconsistency of the Court of Appeals was noted. 64 L.Ed.2d at 61.[5]

Depressed socio-economic status, even when added to the other *Zimmer* factors, does not make out a case of unconstitutional dilution.

(5) A Case Of Unconstitutional Dilution Of Black Voting Rights Was Not Established Here

This case was tried prior to this Court's decision in *Bolden*. Consequently, the district court here, as did the district court and Court of Appeals in that case, relied entirely on the *Zimmer* factors to establish an inference of discrimination in the *retention* of the system. In both cases, the at large law was enacted in 1911 when black participation in voting was no longer a factor and there was no need to resort to at large voting as a discriminatory device. In both cases, the district court found that the at large acts were not adopted for a discriminatory purpose. In both cases, the same type of evidence was

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5 "On the basis of these findings, the court concluded that the political processes in Mobile were not equally open to Negroes, despite its seemingly inconsistent findings that there were no inhibitions against Negroes becoming candidates, and that in fact Negroes had registered and voted without hindrance." (64 L.Ed.2d at 61).

relied upon, and the plaintiffs were found to have succeeded in establishing the same 3 *Zimmer* criteria in both cases. See *Bolden v. City of Mobile*, 423 F.Supp. 384 (D.C. Ala. 1976). Here, the evidence was even weaker than in *Bolden*, for there is no evidence whatever that efforts to change the system were defeated by resort to racial arguments. Here, this case was the first effort to challenge the at large system. The sole means of proving purposeful discrimination in this case was by use of the *Zimmer* criteria, and the added factor of socio-economic deprivation which, as previously shown, is really part of the *Zimmer* factor relating to the effects of past discrimination. There was also evidence in *Bolden* supporting this latter factor. See 423 F.Supp. at 391. In *Bolden*, this Court held that the *Zimmer* criteria are insufficient to make out a case, thereby changing the governing principles. Notwithstanding the Court of Appeals' pronouncement in *Kirksey v. City of Jackson*, 625 F.2d 21 (C.A. 5th 1980), that in a case where the legal principles on which the case was tried have changed by the time of appeal, the proper procedure is to vacate and remand for reconsideration, the Court of Appeals declined to do so here, but upheld the decision below on the basis that the district judge foresaw this Court's decision in *Bolden*, changing the *Zimmer* criteria from *presumption* to *inference* status, and hence the proper legal principles were applied regardless. As previously shown, such a reading of this court's decision in *Bolden* is completely unfounded. In effect, the Court of Appeals below upheld a case of unconstitutional vote dilution on evidence no stronger, and probably weaker, than that held insufficient in *Bolden*. The end result is, of

course, that the Court has invalidated at large voting in Burke County without a showing of purposeful discrimination, either in enactment or in retention of the system.

Moreover, even assuming the continuing validity of the *Zimmer* criteria, the finding below is clearly erroneous for these reasons:

(1) The Court below confused 2 of the *Zimmer* criteria by holding that satisfaction of the factor relating to a showing of continuing effects of prior discrimination also establishes lack of access to slating, despite the fact that the undisputed evidence was that blacks had no difficulty in registering, voting or running for office in Burke County.

(2) The Court below found that a freeholder requirement for registrars precluded black participation (R. 779). This law, Ga. Code §34-605, had been repealed prior to the filing of this suit.

(3) The Court also found, and the Court of Appeals reiterated it (639 F.2d at 1377) that the County only established new registration sites following "friendly persuasion" by the Court at a pretrial conference (R. 783). This is incorrect. These sites were established on February 10, 1976 (D.E. 4) before this case was filed on April 5, 1976, and many months before the first pretrial conference was held on March 4, 1977.

(4) The Court below found that the Commissioners donated public money to buy band uniforms for the private school (R. 784). To the contrary, the evidence

was that the Commissioners *refused* to contribute county money to the *public* high school band because such funds could not legally be used for such purposes (T2. 84, 150, P.E. 37).

(5) The district court found that blacks had been excluded from the local Democratic Executive Committee (R. 788), and the Court of Appeals approved this finding. 639 F.2d at 1378. There was no evidence at all supporting this finding. The evidence showed that these positions were not appointed, but were elected by the people in the Democratic primary; that widespread announcements of the elections therefor were given in the newspapers and radio, and that little interest was exhibited by whites or blacks. (T. 99, 109-110, 148-150, 542, 894-5). It even appears that in recent times, these elections are on a district basis, yet blacks still do not seek them. It is hardly correct to say that blacks have been "excluded" when the positions are elected and blacks simply do not offer.

(6) Much ado was said about segregation in the school system. While the evidence showed that what segregation existed was in small isolated schools under conditions approved by a federal court order, the fact is that the county commissioners have nothing to do with the school system, which is under the complete control of a separate Board of Education vested with plenary power by the State Constitution, Art. VIII, Sec. V, Par. II (§2-5302), including the authority to levy the local taxes necessary therefor. Art. VIII, Sec. VII, Par. I (§2-5501). Acts of a separate governing body, approved by a federal court, can not be imputed to the

Commissioners. *Milliken v. Bradley*, 418 U.S. 717, 748 (1974).

(7) The Court found that the size of the district is large, referring to the fact that Burke County is a large county geographically containing 832 square miles. 639 F.2d at 1380. The reference to "size" in *Whitcomb v. Chavis*, 403 U.S. 124, 143 (1971) was clearly directed toward the number of *persons* and *positions*, which cause voter confusion. Burke County had only 18,255 persons according to the 1970 Census. This is less people than are represented by a single member of the Georgia House of Representatives (25,500) and less than one-fourth the average number of persons represented by a State Senator (81,964). As far as the County's geographic size, it is less than a square with 29 miles on each side.

(8) Lastly, while the Court found evidence of past discrimination, none of it related to *voting*, and there was no evidence that discrimination in other areas affected voting.

Therefore, even under the pre-*Bolden Zimmer* analysis, the decision below is erroneous.

(6) The Fifteenth Amendment Does Not Reach A Voting Dilution Case

In *Bolden*, the plurality opinion holds that the Fifteenth Amendment does not apply to a voting dilution case. 64 L.Ed.2d 57. Mr. Justice Blackmun did not address the issue. Mr. Justice Stevens felt that the Fifteenth Amendment does apply, 64 L.Ed.2d at 69, and

Justices Marshall and Brennan seem to agree. The Court of Appeals in this case holds the Fifteenth Amendment to be applicable, 639 F.2d at 1372, as did the panel in *United States v. Uvalde School District*, 625 F.2d 547, 553 (C.A. 5th 1980), whereas a different panel in *McMillan v. Escambia County*, 638 F.2d 1239, 1243 (C.A. 5th 1981), held that it does not apply.

Therefore, this is a substantial question which has not been definitely resolved. Appellants, of course, adopt the view expressed by the plurality opinion in *Bolden*, 64 L.Ed.2d at 57.

(7) The Dilution Doctrine Does Not Apply To County Governing Bodies

Four justices expressed doubt that the dilution doctrine applies to the governing bodies of municipalities and other political subdivisions in *Wise v. Lipscomb*, 437 U.S. 535, 550 (1978). There are clear differences. In state legislative seat cases, most of the districts are almost always single member districts, so when a multimember district is included, the question naturally arises as to why should such districts be different. Also, there are valid reasons why a districtwide allegiance is desirable in a public body having a greater identity of problems, which do not exist when considered as to a state legislature. See Note, 87 Harv. L.R. 1851, 1857 (1974).

Appellants urged this question below, and they urge it now.

(8) The Courts Below Erred In Ordering Into Effect A Plan Proposed By Plaintiffs Without Having Found Defendants' Plan To Be Invalid And Having Permitted Defendants To Submit It Under Section 5 Of The Voting Rights Act

In a case attacking a districting device as being unconstitutional, the Court should not itself devise a new plan, but should permit the body an opportunity to devise its own plan and submit it under Section 5 of the Voting Rights Act for preclearance. *Wise v. Lipscomb*, 437 U.S. 535 (1978); *Berry v. Doles*, 438 U.S. 190 (1978); *Sanchez v. McDaniel*, 615 F.2d 1023 (C.A. 5th 1980).

CONCLUSION

County-wide voting has been in effect in Burke County continuously since 1911. The undisputed evidence shows that blacks who are a majority in the County, register, vote and run for office without hindrance. The district court below, which decided the case prior to *City of Mobile v. Bolden*, 446 U.S. 55 (1980), found that the at large system was neutral when adopted, but that it had been maintained for a racially discriminatory purpose, based entirely on the discriminatory impact criteria formulated in *Zimmer v. McKeithen*, 485 F.2d 1297 (C.A. 5th 1973). The Court of Appeals upheld that determination, concluding that this Court's decision in *Mobile v. Bolden* had not really changed the law except to accord the *Zimmer* criteria *inference* rather than *presumption* status; that the district judge below had rightfully forseen this Court's deci-

sion two years before it was rendered, and applied this "inference" test. The decisions below therefore are clearly incorrect, and amount to striking down an election system in effect for 67 years on the basis of evidence which at best only doubtfully shows discriminatory impact and clearly fails to show discriminatory purpose. As thus applied by the Court of Appeals, the *Zimmer* criteria in practice have fulfilled an early prediction that they would become tantamount to a *per se* rule of illegality. See 87 Harv. L.R. 1851, 1859 (1974). The *Zimmer* approach is deficient in methodology. On the one hand, it permits a plaintiff to parade before the Court every minor detail of prior discrimination in the history of the area in the expected hope that the revulsion to this unhappy past will somehow obscure reasoning and evoke a favorable response based on sympathy rather than reason. Second, it involves the Courts in passing on such patently political questions as to whether the legislature has been responsive to minority needs. Courts are hardly appropriate forums to exercise judgment on such questions. The wisdom of legislation has never been considered to be a proper question for judicial determination.

This case was tried in the district court after this Court's decision in *Washington v. Davis*, 426 U.S. 229 (1976), and after the Court of Appeals' decision in *Nevett v. Sides*, 571 F.2d 209 (C.A. 5th 1978), holding that discriminatory purpose had to be shown in voting dilution cases. Consequently, both parties were well aware that discriminatory purpose was a requirement. Plaintiffs sought to establish its existence by reference sole-

ly to the *Zimmer* criteria. Defendants on the other hand, presented evidence showing valid grounds for the at large plan; that this case was the first effort ever launched to change it; and that its retention was not traceable to a discriminatory purpose. Where, as here, the record on appeal is complete, this Court should reverse and remand for entry of judgment on behalf of defendants. *Boyle v. Wells,* 103 F.2d 237 (C.A. 6th 1939), cert. den. 308 U.S. 579; *Engleman v. Cahn,* 425 F.2d 954 (C.A. 2nd 1969), cert. den. 397 U.S. 1009; *Levin v. Mississippi River Fuel Corp.,* 386 U.S. 162, 170. Where plaintiffs' evidence is insufficient, reversal and remand for entry of judgment for the defendant is proper. *New York, etc., R. Co. v. Henagan,* 364 U.S. 441, 5 L.Ed.2d 183 (1960). In voting dilution cases, the Court of Appeals has not hesitated to remand with directions for judgment to be entered below for a plaintiff. *Wallace v. House,* 538 F.2d 1138 (C.A. 5th 1976). There should not be one rule for plaintiffs and a different one for defendants, for "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection, all classes of men, at all times and under all circumstances." *Ex Parte Milligan,* 4 Wall. 2, 120 (1866). This Court should reverse the judgment below and remand with directions that judgment be entered for defendants. Otherwise, the Court of Appeals, in keeping with its past performance, will simply re-rationalize the *Zimmer* criteria and find some other obscure, esoteric basis of distinction.

Respectfully Submitted,

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APPENDIX A

[1358] 639 Federal Reporter, 2nd Series

Herman LODGE et al.,
Plaintiffs-Appellees,

v.

J. F. BUXTON et al.,
Defendants,

Ray DeLaigle et al.,
Defendants-Appellants.

No. 78-3241.

United States Court of Appeals,
Fifth Circuit.
Unit B

March 20, 1981

[1360] Before JONES, FAY and HENDERSON, Circuit Judges.

FAY, Circuit Judge:

Plaintiff class, consisting of all Black residents of Burke County, Georgia, brought this action to have that county's system of at-large elections declared invalid as violative of the First, Fourteenth and Fifteenth

Amendments to the United States Constitution and Title 42 U.S.C. §§1971 and 1973. The District Court for the Southern District of Georgia held for the plaintiffs, on the grounds that the at-large election process was maintained for the purpose of limiting Black access to the political system in violation of their Fourteenth and Fifteenth Amendment rights. Accordingly, the District Court ordered that the existing system of at-large elections be abandoned and that the county be divided into five districts with each district electing one county commissioner. We affirm the judgment of the District Court in all respects.

FACTS

This case arose in Burke County, a large and predominantly rural county in southern [1361] Georgia. In fact Burke County is the second largest of Georgia's 159 counties in terms of the area it encompasses.[1] Burke is similar to many rural counties in Georgia in that its economic base is predominantly agricultural. The county's population is somewhat over 10,000 people, a slight majority of whom are Black.[2] No Black has ever been elected to the county commission in Burke County.

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1 Burke County is 832 square miles in area, making it approximately the size of two-thirds of the State of Rhode Island.

2 The following population table is taken from the District Court's findings of fact and conclusions of law:

This suit was filed in 1976 by various named plaintiffs as representatives of the class of all Black residents of Burke County.[3] It alleged that the county's system of at-large elections violated plaintiff's First, Fourteenth and Fifteenth Amendment rights, as well as their rights under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. §1973, and the Reconstruction Act, 42 U.S.C. §1971, by diluting the significance of the

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YEAR *c	TOTAL POPULATION	PERCENTAGE *b WHITE	PERCENTAGE *a BLACK
1975	10,700	42%	58%
1970	10,988	40%	60%
1960	20,596	34%	66%
1950	23,458	29%	78%
1940	26,520	25%	75%
1930	29,224	22%	78%

*a
Percentage is to the nearest whole percent.

*b
The "percentage white" figure includes a category labelled "foreign born white"; the greatest number in this group was 42, in 1930. After 1930, this statistic apparently was not kept.

*c
The 1975 figures are a mid-census estimate taken from plaintiffs' exhibit 191.

In addition, the record indicates that the disparity in size between the White and Black residents of Burke County has continued to decrease since 1975, so that the current Black majority is very slight.

3 The class was actually certified by Judge Alaimo on May 12, 1977, some eleven months after suit was filed.

Black vote, thereby unconstitutionally restricting their right to meaningful access to and participation in the electoral process.

After a trial, during which both parties offered voluminous evidence in support of their respective positions, the District Court held for plaintiff. The court concluded that the at-large system had been maintained for the purpose of limiting Black participation in the electoral process. The court entered an order, setting forth the findings of fact and conclusions of law, requiring Burke County to elect five county commissioners, one from each of five districts into which the county was to be divided.[4] The court's order of October 26, 1978 was to be effectuated by the time of the general election [1362] on November 8,

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4 The following table shows a breakdown of the population of the districts in the plan selected by the District Court as to race and voting age and percentage deviation by district:

District	Total Population	Black Population	(%)	White Population	(%)	% Deviation
1	3,736	2,899	(77.6)	837	(22.4)	+2.3
2	3,673	2,753	(74.9)	920	(25.1)	+0.5
3	3,595	1,914	(53.2)	1,681	(46.8)	-1.6
4	3,590	1,852	(51.6)	1,738	(48.4)	-1.7
5	3,661	1,570	(42.9)	2,091	(57.1)	+0.3

District	Voting Age Population	Black Voting Age Population	(%)	White Voting Age Population	(%)
1	2,048	1,482	(72.4)	556	(27.6)
2	2,029	1,407	(69.3)	622	(30.7)
3	2,115	978	(46.2)	1,137	(53.8)
4	2,112	947	(44.6)	1,175	(55.4)
5	2,217	803	(36.2)	1,414	(63.8)

1978. The District Court denied defendant's motion for a stay of that order pending the outcome on appeal. On October 27, 1978, this Court also denied defendant's motion for a stay pending appeal. On November 3, 1978, Justice Powell granted defendant's motion for a stay pending final disposition of the appeal by this Court.

ISSUES PRESENTED

Appellant asserts that the District Court erred by applying an incorrect legal standard in assessing appellee's constitutional rights. Appellant contends that the District Court did not and could not find that the at-large electoral system was created or maintained for the purpose of limiting Black participation in that system, as required by the Supreme Court in the recent decision of *City of Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980). Appellant contends that, while the operation of the system may have had the affect of limiting Black participation, the system was not designed or maintained to so operate.

In response, appellee offers various bases for affirming the District Court's judgment. They contend that the trial court correctly found the requisite degree of purposeful or intentional maintenance of a discriminatory system within the meaning of the Supreme Court's decision in *Bolden* and *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1972). They assert, alternatively, that inability to meaningfully participate

in the electoral system violates a fundamental liberty interest within the meaning of the First Amendment. They contend that Section 2 of the Voting Rights Act of 1965, 42 U.S.C. §1973 and the Reconstruction Act, 42 U.S.C. §1971(a)(1) proscribe at-large voting systems having a discriminatory effect, without regard to the purpose or intent of that system.

BACKGROUND

We believe this case turns on the interpretation of the proscriptions of the Fourteenth and Fifteenth Amendments. Therefore, we begin with a review of the application of those constitutional principles to voting dilution cases.[5] There are certain truisms that can be set out from the beginning. At-large voting is not *per se* unconstitutional. *Burns v. Richardson*, 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966); *Fortson v. Dorsey*, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401 (1965). No group, whether racially or ethnically identifiable has a right to elect representatives proportionate to its voting power in the community. *White v. Regester*, 412 U.S. 755, 765-66, 93 S.Ct. 2332, 2339 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 149-50, 91 S.Ct. 1858, 1872, 29 L.Ed.2d 363 (1971). Even consistent defeat at the polls

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5 The Fourteenth Amendment provides in pertinent part, the following: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The Fifteenth Amendment provides, in pertinent part, the following: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

by a racial minority does not, in and of itself, give rise to constitutional claims. *Whitcomb*, 403 U.S., at [1363] 152-53, 91 S.Ct. 1874. In order to find a law, racially neutral on its face, unconstitutional, the plaintiff must prove that it was conceived or maintained with the intent or purpose of promoting invidious discrimination. *Id.*, at 149, 91 S.Ct. 1872. As this applies to voting dilution cases such as this, plaintiff must establish that the racially neutral at-large system was created or maintained for the purpose of preventing minority groups from effectively participating in the electoral process.[6]

It is one thing to say that the plaintiff must establish proof that the purpose for creating or maintaining a system was to unconstitutionally restrict the access of a group to the political process, it is quite another to say what evidence will suffice to establish that discriminatory purpose or intent. Cases involving literacy tests or poll taxes, or property ownership requirements are, by comparison, easy to decide. The most obvious purpose for the creation or maintenance of such systems is clearly discrimination.

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6 One of the conceptual reasons for allowing voting dilution cases to be maintained was well expressed by this Court in *Nevett v. Sides*, 571 F.2d 209 (5th Cir. 1978), *cert. denied*, 446 U.S. 951, 100 S.Ct. 2916, 64 L.Ed.2d 807 (1980). The Court said,

> An invidious at-large scheme merely achieves the same end [as gerrymandering], denial of effective participation, by submerging an interest group in a constituency large enough and polarized enough to place that group in the [electoral] minority consistently.

Id. at 219.

In a voting dilution case in which the challenged system was created at a time when discrimination may or may not have been its purpose,[7] it is unlikely that plaintiffs could ever uncover direct proof that such system was being maintained for the purpose of discrimination.[8] Neither the Supreme Court nor this Court, however, has denied relief when the weight of the evidence proved a plan to intentionally discriminate, even when its true purpose was cleverly cloaked in the guise of propriety. The existence of a right to redress does not turn on the degree of subtlety with which a discriminatory plan is effectuated. Circumstantial evidence, of necessity, must suffice, so long as the inference of discriminatory intent is clear.

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7 The general election laws in many jurisdictions were originally adopted at a time when Blacks had not received their franchise. No one disputes that such laws were not adopted to achieve an end, the exclusion of Black voting, that was the status quo. Other states' election laws, though adopted shortly after the enactment of the Fifteenth Amendment, are so old that whatever evidence of discriminatory intent may have existed, has long since disappeared. This case falls within that category. The focus then becomes the existence of a discriminatory purpose for the *maintenance* of such a system.

8 We think it can be stated unequivocally that, assuming an electoral system is being maintained for the purpose of restricting minority access thereto, there will be no memorandum between the defendants, or legislative history, in which it is said, "We've got a good thing going with this system; let's keep it this way so those Blacks won't get to participate." Even those who might otherwise be inclined to create such documentation have become sufficiently sensitive to the operation of our judicial system that they would not do so. Quite simply, there will be no "smoking gun."

The question then becomes, from what type of circumstantial evidence may an inference of intent be drawn, and how much of it is required? The answer to that question may be contained in the Supreme Court's recent decision in *Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980).

Appellant contends that *Bolden* represents a radical shift from and rejection of the law of this Circuit rendered prior to that decision. Appellee, as might be expected, denies that *Bolden* represents any such radical change. We believe it fair to say that *Bolden* contains certain ambiguities,[9] requiring this Court to attempt to construe it in a manner consistent with [1364] other precedents of the Supreme Court, with the expressed and implied intent of that Court and with decisions of this Court. To that end, we will begin with a review of the Supreme Court decisions and decisions of this Court prior to the Supreme Court's ruling in *Bolden*.[10] Next, we will set out in detail the positions taken by the Justices in their various opinions in *Bolden*. At that point we will attempt to reconcile *Bolden* with prior decisions,

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9 *See United States v. Uvalde Consolidated Independent School District*, 625 F.2d 547 (5th Cir., 1980). "The ambiguity of the plurality opinion [in *Bolden, supra*] is alleviated by the various dissents and concurring opinions. . . ." *Uvalde* at 582.

10 We do not attempt herein to provide an exhaustive review of all the decisions of this Court or the Supreme Court that lead up to the current state of the law. For an excellent historical survey, see Judge Tjoflat's opinion for this Court in *Nevett v. Sides, supra*, note 6. Our purpose is simply to state the law prior to *Bolden*, and to determine the impact of that ruling on this case.

and establish a workable rule to follow.[11] Only at that point will we consider the facts of this case and the various legal theories of each party.

THE LAW BEFORE BOLDEN[12]

In *Whitcomb v. Chavis*, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971), the Supreme Court held, among other things, that the Equal Protection Clause of the Fourteenth Amendment was not violated, although the challenged multi-member district electoral system used in Marion County, Indiana resulted in the election of disproportionately few of that county's Black ghetto citizens. The Court concluded that the results were an inevitable political reality, because the Blacks, voting solidly as Democrats, were outvoted by the Re-

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11 The rule we establish is for dilution claims brought under the Fourteenth and Fifteenth Amendments. We do not reach appellees First Amendment or statutory bases for affirming the District Court's judgment. With respect to the assertion that section 2 of the Voting Rights Act, 42 U.S.C. §1973, provides a remedy for conduct not covered by the Fifteenth Amendment, we are bound by the expression of five Justices of the Supreme Court (*see* the opinions of Stuart, J. and Marshall, J., *dissenting*) that such is not the case. We do not express any opinion as to the application of the First Amendment or 42 U.S.C. §1971 to this case. We believe such new courses should be charted by the Supreme Court which, as of yet, has not chosen to do so. We believe our restraint in this area is particularly appropriate given the fact that the District Court did not consider those grounds in its evaluation of the case.

12 We refer here to the law prior to the Supreme Court's decision in *Bolden*. Included in this section is an analysis of this Court's decision in *Bolden*.

publicans in most elections. In rejecting plaintiff's claim for relief, however, the Court noted several areas which, if factually proven, could have strengthened plaintiff's case. At one point the Court said,

> But we have deemed the validity of multi-member districts justifiable, recognizing also that they may be subject to challenge where the circumstances of a particular case may 'operate to minimize or cancel out the voting strength of racial or political elements of the voting population.' *Fortson*, 779 U.S. at 439 [85 S.Ct. at 501], & *Burns*, 384 U.S. at 88 [86 S.Ct. at 1294]. Such a tendency, we have said, is enhanced when the district is large and elects a substantial portion of the seats in either house of a bicameral legislature, . . . or if it lacks provision for at-large candidates running from particular geographical subdistricts, as in *Fortson*. . . .

403 U.S., at 143-44, 91 S.Ct. at 1869. The Court later went into greater detail, saying, "[b]ut there is no suggestion here that Marion County's multi-member district or similar districts throughout the state, were conceived or operated as purposeful devices to further racial or economic discrimination. . . .

We have discovered nothing in the record or in the Court's findings indicating that poor Negroes were not allowed to register or vote, to choose the political party

they desired to support, to participate in its affairs or to be equally represented on those occasions when the legislative candidates were chosen." *Id.* at 149, 91 S.Ct. at 1872.

Two terms after *Whitcomb*, the Supreme Court decided *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1972). In that case the Court affirmed the District [1365] Court's judgment that the multi-member districts in Dallas and Bexar County, Texas unconstitutionally diluted the voting rights of certain racial and ethnic minority groups within those counties. The Court began with the proposition enunciated in *Whitcomb*, that "[t]he plaintiff's burden is to produce evidence to support findings that the political process leading to nomination and election were not equally open to participation by the group in question — that its members had less opportunity than did other residents in the district to participate in the political process and to elect legislators of their choice." 412 U.S., at 766, 93 S.Ct. at 2339. The Court held that this standard had been met by plaintiffs in Dallas County, with proof that (1) the history of official racial discrimination affected the rights of Blacks to register, vote, and participate in the political process, (2) the requirements of a majority vote in primary elections coupled with the requirement that candidates run from a "place",[13] though not improper in themselves, en-

13 Running from a "place" is the same as running from a numbered post. A candidate selects the area whose seat he wishes to run for, although he need not live in that area.

hanced the opportunity for racial discrimination, (3) extremely few Blacks had been slated or elected in Dallas County since the days of Reconstruction, (4) the slating organization and its candidates who were elected were unresponsive to the needs and aspirations of the Black population because the Blacks' votes were not needed, and (5) the slating organization recently had relied on racial campaign tactics to defeat those candidates expressing concern for the needs and rights of the Black community.[14] In the case of Bexar County,

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14 With due regard for these standards, the District Court first referred to the history of official racial discrimination in Texas, which at times touched the right of Negroes to register and vote and to participate in the democratic processes. 343 F.Supp., at 725. It referred also to the Texas rule requiring a majority vote as a prerequisite to nomination in a primary election and to the so-called "place" rule limiting candidacy for legislative office from a multimember district to a specified "place" on the ticket, with the result being the election of representatives from the Dallas multimember district reduced to a head-to-head contest for each position. These characteristics of the Texas electoral system, neither in themselves improper nor invidious, enhanced the opportunity for racial discrimination, the District Court thought.[10] More fundamentally, it found that since Reconstruction days, there have been only two Negroes in the Dallas County delegation to the Texas House of Representatives and that these two were the only two Negroes ever slated by the Dallas Committee for Responsible Government (DCRG), a white-dominated organization that is in effective control of Democratic Party candidate slating in Dallas County.[11] That organization, the District Court found, did not need the support of the Negro community to win elections in the county, and it did not therefore exhibit good-faith con-

the Court found the requisite exclusion from the political process with the same type, although a lesser quantity, of evidence. The Court based its decision on the finding that (1) there was a long history in Bexar County of invidious discrimination in the fields of "education, employment, economics, health, politics and others," (2) "the typical Mexican-American suffers a cultural and language barrier that makes his participation in community processes extremely difficult . . .," (3) Mexican-Americans were vastly underrepresented in elective positions, (4) Mexican-Americans were hindered in their efforts to register to vote until recently by a restrictive registration procedure and (5) the Bexar County [1366] state legislative delegation was insufficiently responsive to the interests of the Mexican-American community, when considered in the aggregate, supported plaintiff's position that they were effectively removed from the political process in Bexar County.

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cern for the political and other needs and aspirations of the Negro community. The court found that as recently as 1970 the DCRG was relying upon "racial campaign tactics in white precincts to defeat candidates who had the overwhelming support of the black community." *Id.*, at 727. Based on the evidence before it, the District Court concluded that "the black community has been effectively excluded from participation in the Democratic primary selection process," *id.*, at 726, and was therefore generally not permitted to enter into the political process in a reliable and meaningful manner. These findings and conclusions are sufficient to sustain the District Court's judgment with respect to the Dallas multimember district and, on this record, we have no reason to disturb them.

412 U.S., at 766-67, 93 S.Ct. at 2339-40.

Following *White*, this Court decided the case of *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) *(en banc), aff'd on other grounds, sub nom., East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1975).[15] In *Zimmer*, we held a multi-member system of elections in East Carroll Parish, Louisiana violative of plaintiff's constitutional rights in that it diluted the impact of the votes of minority residents of that community. This Court, taking guidance from the decisions of the Supreme Court in *White v. Regester*, and *Whitcomb v. Chavis*, set out a list of factors that courts should consider in evaluating the constitutional permissibility of voting practices alleged to discriminate against racial minorities. We said,

> . . . where a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particular interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provisions for at-large candidates running from particu-

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15 The Supreme Court expressly said that it affirmed the judgment "without approval of the constitutional views expressed by the Court of Appeals." 424 U.S., at 638, 96 S.Ct., at 1084.

> lar geographical subdistricts. The fact of dilution is established upon proof of the existence of an aggregate of these factors. The Supreme Court's recent pronouncement in *White v. Regester, supra*, demonstrates, however, that all these factors need not be proved in order to obtain relief.

Zimmer at 1305.[16]

Finding that all the primary factors, except unresponsiveness,[17] were established, and that many of the "enhancing" factors were present, this Court concluded that a constitutional violation had been established.

Five years later, this Court was called on to reconsider its *Zimmer* analysis, in light of the Supreme Court's decisions in *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429

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16 In *Zimmer*, the proof of these criteria was an end unto itself. This Court did not make the next inquiry, as is now required, as to the extent to which the proof of those factors would allow an inference of intentional discrimination to be drawn.

17 As will be discussed, *infra*, *Zimmer* was constitutionally infirm to the extent relief was granted without proof of unresponsiveness. We believe this is one of the significant reasons that *Zimmer* was criticized so strongly in *Bolden*.

U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977).[18] It did so in a series of cases decided the same day: *Nevett v. Sides*, 571 F.2d 209 (5th Cir. 1978), *cert. denied*, 446 U.S. 951, 100 S.Ct. 2916, 64 L.Ed.2d 807 (1980); *Mobile v. Bolden*, 571 F.2d 238 (5th Cir. 1978), *rev'd.*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980); *Blacks United for Lasting Leadership v. Shreveport*, 571 F.2d 248 (5th Cir. 1978); *Thomasville* [1367] *Branch of the NAACP v. Thomas County*, 571 F.2d 257 (5th Cir. 1978).[19]

In the first case in that series, *Nevett v. Sides, supra*, Judge Tjoflat, writing for this Court, extensively reviewed the status of the law with regard to claims that certain voting practices violate the Fourteenth and Fifteenth Amendment rights of racial minorities. On the basis of *Washington v. Davis*, and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Court con-

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18 These were not voting dilution cases. They simply reaffirmed "the basic equal protection principle that the invidious quality of law [neutral on its face] claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." 426 U.S., at 240, 96 S.Ct., at 2048. The Court indicated its intent to have the rule broadly applied to cases such as this, by referring approvingly to *Wright v. Rockefeller*, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964), a congressional apportionment case, in which proof of discriminatory purpose was required.

19 We discuss herein only the first two of the four cases. The first case, *Nevett v. Sides*, is important to this analysis because this Court used that case to set forth the principles of law to be applied in all such cases. The second decision, *Mobile v. Bolden*, is significant here because it was the Supreme Court's rejection of our analysis in that case that gives rise to appellant's contention that this Court has been employing an erroneous legal standard.

cluded that such a claim could not to [sic] be established without proof that the allegedly discriminatory system was conceived or maintained for the purpose of restricting the access of minorities to the political process. 571 F.2d at 219-21.[20]

As was the case in decisions discussed previously, the question became what type and how much evidence is required to establish proof of intent. Particularly, the Court was attempting to set forth the evidence that would allow an inference to be drawn that the electoral system was being maintained, rather than implemented, for a discriminatory purpose.[21] After detailed analysis the Court concluded that the presence of the factors set out in *Zimmer could* allow the inference of purposeful discrimination to be drawn. The Court reasoned that if the electoral system was not being maintained for the purpose of achieving the constitutionally proscribed end, i.e., official perpetuation of

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20 So that there can be no doubt that the Court thought purpose or intent to be essential elements of a Fourteenth or Fifteenth Amendment claim, we quote some of the language in that opinion. With respect to a claim founded on the Fourteenth Amendment, the Court said, ". . . we hold that a showing of racially motivated discrimination is a necessary element in an equal protection voting dilution claim such as the one presented in this case." 571 F.2d at 219. Similarly, the Court said, "A showing of improper motivation or purpose is necessary to establish a valid cause of action under the Fifteenth amendment." *Id.* at 221.

21 There was no contention that the system was created for discriminatory purposes because, at the time of its creation, Blacks had been effectively disenfranchised by an amendment to the Alabama Constitution.

discriminatory distribution of political and economic power, it was highly unlikely that the criteria set out in *Zimmer* could be established. The Court was quick to indicate on the other hand, that the finding of purpose or intent should not be a mathematical process by which the party proving or refuting the greatest number of criteria is declared the winner. We said,

> [t]hat the finder of fact determines the plaintiff has prevailed under one or even several of the *Zimmer* criteria may not establish the existence of intentional discrimination. *See, e.g., McGill v. Gadsden County Commission,* 535 F.2d 277 (5th Cir. 1976). The evidence under the other criteria may weigh so heavily in favor of the defendant that the evidence as a whole will not bear an inference of invidious discrimination. Of course, the plaintiff need not prevail under all of the criteria, *Zimmer,* 485 F.2d at 1305, nor is he limited to them. The task before the fact finder is to determine, under all the relevant facts, in whose favor the "aggregate" of the evidence preponderates. This determination is peculiarly dependent upon the facts of each case. It comprehends "a blend of history and an intensely local appraisal of the design and impact of the [at-large] district in the light of past and present reality, political and otherwise." *White v. Regester,* 412 U.S., at 769-70, 93 S.Ct., at 2341. It is the obligation, therefore, of the finder of fact carefully

> to examine and weigh the competing factors to determine whether the coincidence of those probative of intentional discrimination is sufficient.
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> [1368] "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. at 564.

571 F.2d at 224-25.

The Court went to great lengths to explain how each of the *Zimmer* criteria, if established, could be evidence allowing an inference of intent. Of particular significance to our resolution of this case is our discussion of the un-responsiveness factor. The Court said

> Consider a plan neutral in its enactment that is used as a vehicle for intentionally ignoring black interests. The existence of such discrimination presupposes racially polarized voting in the electorate. Polarized or bloc voting, although in itself constitutionally unobjectionable, allows representatives to ignore minority interests without fear of reprisal at the polls. When bloc voting has been demonstrated, a showing under *Zimmer* that the governing body is unresponsive to minor-

> ity needs is strongly corroborative of an electorate's bias. The likelihood of intentional exploitation is "enhanced" by the existence of systemic devices such as a majority vote requirement, an anti-single shot provision, and the lack of a requirement that representatives reside in subdistricts.

571 F.2d at 223.

Having established the standard by which to evaluate evidence of intent, the Court considered the facts of the case then at bar. Finding the factual determinations of the trial court, that plaintiffs had failed to establish evidence of the *Zimmer* criteria, not to be clearly erroneous, this Court affirmed the District Court's judgment for defendants.

Mobile v. Bolden, 571 F.2d 238 (5th Cir. 1978), *rev'd*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980) was the second of the four voting dilution cases decided by this Court. In that case, this Court affirmed the District Court's judgment that plaintiff-appellee's Fourteenth and Fifteenth Amendment rights had been violated, and reinstated the District Court's order requiring that city commissioners be elected from single-member districts in the future.

Rather than repeat the lengthy historical analysis by which the Court in *Nevett, supra*, concluded that proof of intentional or purposeful maintenance of a discrimi-

natory system was a requisite to proving a dilution case, the Court simply incorporated by reference that portion of the *Nevett* decision.[22] At only one place in the decision did the Court explicitly refer to the intent requirement. The Court said,

> Under our holding of today in *Nevett II*, these findings also compel the inference that the system has been maintained with the purpose of diluting the black vote, thus supplying the element of intent necessary to establish a violation of the fourteenth amendment, *Village of Arlington Heights*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 597 (1976), and the fifteenth amendment, *Wright v. Rockefeller*, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964).

571 F.2d at 245. Despite the brevity of this comment, a careful reading of the decision confirms our conclusion that the Court was following the purpose or intent standard set out in *Washington v. Davis*, and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*

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22 "We also incorporate the portions of our opinion of today in *Nevett II* [*Nevett v. Sides*] that explicate the legal principles applicable to voting dilution cases." 571 F.2d at 241. We believe the Court's decision to incorporate by reference the legal standard, with respect to the necessity of establishing proof of purpose or intent, may have given rise to the erroneous conclusion that this Court did not recognize the need for such proof in that case. A careful reading of our opinion in *Bolden*, however, leads inextricably to the conclusion that proof of discriminatory intent was required.

In attempting to evaluate the existence of discriminatory intent in the maintenance of a racially neutral electoral system, the [1369] Court was required to consider circumstantial evidence from which an inference of intent could be drawn. Accordingly, the Court applied the *Zimmer* criteria and, holding the District Court's finding of intentional maintenance of a discriminatory system not to be clearly erroneous,[23] entered judgment for the plaintiffs. The remedy afforded, however, was considerably different than in the traditional dilution case. Mobile had operated under a three-person commission form of government. The commission was responsible for all executive and administrative functions of the city. The three commissioners elected one of their members to serve as Mayor. The District Court concluded that the discriminatory system could not be remedied, as in the normal case, by dividing the city into districts along preexisting ward or precinct lines. Accordingly, the District Court ordered the commission form of government abolished and replaced it with a mayor-commission system under which the executive and legislative functions were separated, the former being allocated to the mayor, the latter to the council. Additionally, the District Court changed the commission size from three

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23 In reaching its conclusion, that the electoral system was maintained for discriminatory purposes, the District Court found all of the *Zimmer* criteria present except that going to the weight of the state policy behind at-large elections. With respect to that factor, the District Court concluded that it was neutral.

members to a council with nine members, each member being elected from a single-member district.

BOLDEN

We come now to the Supreme Court's recent decision, *Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980). Depending on which party to this litigation one listens to, this decision is either revolutionary, definitive, and absolute or evolutionary, ambiguous, and flexible in its impact on the state of the law. As will be discussed, we do not agree with either of these positions. We do agree, however, that it is a complex ruling; the Court's opinion commanding only a plurality, with a total of six separate opinions being published. In order to shed the most light on the implications of the decision, we will begin by reviewing the positions taken by the Justices in their separate opinions.

(a) *The Plurality*—Justice Stewart, writing for the plurality,[24] begins with an analysis of this Court's opinions with respect to the Fifteenth Amendment. He details the case law development of the Fifteenth Amendment and concludes, as did this Court, that "action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose." 100 S.Ct. at 1497. The plurality then

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24 Justice Stewart was joined in the opinion by Chief Justice Burger, Justice Powell, and Justice Rehnquist.

concludes that only purposeful conduct which *directly* interferes with the rights of Blacks to register or vote is proscribed by the Fifteenth Amendment.[25] The Court said, "That Amendment prohibits only purposefully discriminatory denial or abridgment by government of the freedom to vote 'on account of race, color, or previous condition of servitude.' Having found that Negroes in Mobile, 'register and vote without hindrance,' the District Court and Court of Appeals were in error in believing that the appellants invaded the protection of that Amendment in the present case." 100 S.Ct., at 1499.

The plurality next focused its attention on this Court's conclusion that Mobile's electoral system violated plaintiff-appellee's Fourteenth Amendment equal protection rights. The opinion begins with the proposition taken from *Whitcomb v. Chavis*, and [1370] *White v. Regester*, and adhered to by this Court in its opinion in *Bolden*, 571 F.2d 238 (5th Cir. 1980), that to prove a constitutional violation in a dilution case "it is not enough to show that the group allegedly discriminated against has not elected representatives in proportion to its numbers. (citations omitted). A plaintiff must prove that the disputed plan was 'conceived or operated as [a] purposeful device to further racial discrimination.' " 100 S.Ct., at 1499.

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25 This restrictive view of the role of the Fifteenth Amendment in cases such as this did not command a majority of the Court. In fact, five Justices explicitly stated that, with the proper proof, the Fifteenth Amendment would support a voting dilution claim.

Looking at the record in the case at bar the Court held, ". . . it is clear that the evidence in the present case fell far short of showing that the appellants 'conceived or operated [a] purposeful device to further racial discrimination.' (citation omitted)." 100 S.Ct., at 1502. The Court compared *White v. Regester*, the "only [ ] case [ ] in which the Court sustained a claim that multimember legislative districts unconstitutionally diluted the voting strength of a discrete group." 100 S.Ct. at 1500, with the facts of the case before it. Though recognizing that courts attempting to evaluate the constitutionality of racially neutral legislation ". . . must look to other evidence to support a finding of discriminatory purpose." 100 S.Ct. at 1501, the Court held that "[t]he so-called *Zimmer* criteria upon which the District Court and the Court of Appeals relied were most assuredly insufficient to prove an unconstitutionally discriminatory purpose in the present case." 100 S.Ct., at 1503. The plurality was of the opinion that, while "the presence of the indicia relied on in *Zimmer* may afford some evidence of a discriminatory purpose," 100 S.Ct., at 1503, neither the quality nor the quantity of the evidence presented supported a finding of purposeful conduct.

(b) *Justice Blackmun's concurrence*

In the first of two concurring opinions, Justice Blackmun states that he is joining in the result reached by the plurality "because I believe the relief afforded appellees by the District Court was not commensurate

with the sound exercise of judicial discretion." 100 S.Ct., at 1507. Justice Blackmun was unable to accept the District Court's decision to force Mobile to abandon its seventy year old commission form of government for a mayor-council system, without first attempting to fashion a remedy that would be compatible with the existing system. Justice Blackmun said, ". . . I do not believe that, in order to remedy the unconstitutional vote dilution [ ] found, it was necessary to convert Mobile's city government to a mayor-council system. In my view, the District Court at least should have maintained some of the basic elements of the commission system Mobile long ago had selected — joint exercise of legislative and executive power, and citywide representation." 100 S.Ct., at 1508.

Despite his concurrence in the result, Justice Blackmun was clear in his view that he agreed with Justice White's dissent as to the substantive questions of constitutional law presented. At the outset of his opinion, Justice Blackmun said, "Assuming that proof of intent is a prerequisite to appellees' prevailing on their constitutional claim of vote dilution, I am inclined to agree with Mr. Justice White that, in this case, 'the findings of the District Court amply support an inference of purposeful discrimination, *post*, at 1518." 100 S.Ct., at 1507. It is particularly significant that Justice Blackmun agreed with that portion of Justice White's dissent that said the District Court was correct as to its determination that both the Fourteenth and Fifteenth Amendments had been violated.

(c) *Justice Stevens' concurrence*

Though Justice Stevens concurred in the result, he would have the Court apply a test which appears diametrically opposite that employed by the plurality. He said,

> In my view, the proper standard is suggested by three characteristics of the gerrymander [1371] condemned in *Gomillion:*[26] (1) the 28-sided configuration was, in the Court's word, "uncouth," that is to say, it was manifestly not the product of a routine or a traditional political decision; (2) it had significant adverse impact on a minority group; and (3) it was unsupported by any neutral justification and thus was either totally irrational or entirely motivated by a desire to curtail the political strength of the minority. *These characteristics suggest that a proper test should focus on the objective effects of the political decision rather than the subjective motivation of the decision maker.* (emphasis added)

100 S.Ct., at 1512. Justice Stevens then goes on to say that, not only does he reject the purpose or intent test of the plurality, but also that ". . . I am persuaded that a political decision that affects group voting rights may be valid even if it can be proved that irrational or in-

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26 *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960).

vidious factors have played some part in its enactment or retention." *Id.*

Though it is clear that Justice Stevens rejects the plurality opinion in all respects other than the result achieved, his opinion leaves this and other courts in a somewhat precarious position as to the rule to be applied in future cases. For example, it is unclear what standard Justice Stevens would apply were he to attempt to find the purposeful or intentional conduct that five other Justices would require. In that regard, he rejects the *Zimmer* criteria, not because they are inappropriate when attempting to draw an inference of intent, but rather because he is not concerned with such proof of subjective intent. It is entirely possible, and in fact likely, that he would employ the *Zimmer* criteria were he required to evaluate the existence of discriminatory intent.[27]

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27 Justice Stevens said,

". . . a proper test should focus on the objective effects of the political decision rather than the subjective motivation of the decisionmaker. (citation omitted). In this case, if the commission form of government in Mobile were extraordinary, or if it were no more than a vestige of history, with no greater justification than the grotesque figure in *Gomillion*, it would surely violate the Constitution. That conclusion would follow simply from its adverse impact on black voters plus the absence of any legitimate justification for the system, without reference to the subjective intent of the political body that has refused to alter it."

446 U.S., at 86, 100 S.Ct., at 1512. Justice Stevens looks only to the effects of an electoral system. The *Zimmer* approach looks at those

(d) *Justice White's dissent*

Justice White would reach a result different than that reached by the plurality, although apparently agreeing that purposeful discrimination is a necesary element of a Fourteenth or Fifteenth Amendment dilution claim. His position is quite simply that *Bolden* is controlled by *White v. Regester*, and that the plurality incorrectly applied the rule established in that case, that courts should consider the totality of historical, cultural, and socio-economic factors in evaluating the existence of a purposefully discriminatory electoral system. He begins by demonstrating how the factors considered in *White* were similar, if not identical, to those which the District Court and Court of Appeals applied in finding for the plaintiffs in *Bolden*. He then points out that the District Court and Court of Appeals, addressing "the effect of *Washington v. Davis*, (citations omitted), on the *White v. Regester* standards. . . . concluded that the requirement that a facially neutral statute involved purposeful discrimination before a violation of the Equal Protection Clause can be established was not inconsistent with *White v. Regester* in light of the recognition in *Washington v. Davis* that the discriminatory [1372] purpose may often be inferred from the totality of the relevant facts. . . ." 100 S.Ct., at 1516. Justice White

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same effects, but only to the extent that they allow an inference of intent. It is reasonable to assume, therefore, that, were he required to draw an inference of intent, Justice Stevens would employ the same factors that he thinks are relevant independent of the intent inquiry.

thought this approach to be consistent with that of the Court in *Washington v. Davis*, in which it said, "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts including the fact, if it is true, that the law bears more heavily on one race than another." 426 U.S., at 242, 96 S.Ct., at 2408-49. Ultimately, Justice White concludes that the plurality opinion is simply inconsistent with those of the Court in *White, Whitcomb, Village of Arlington Heights*, and *Washington*, although it expresses an intent to affirm the positions taken in and be consistent with those decisions.

(e) *Justice Brennan's dissent*

Justice Brennan's position is concise and unequivocal. He agrees with Justice Marshall "that proof of discriminatory impact is sufficient in these cases." 100 S.Ct., at 1520. He also states that ". . . even accepting the plurality's premise that discriminatory purpose must be shown, I agree with Mr. Justice Marshall and Mr. Justice White that appellees have clearly met that burden." *Id.*

(f) *Justice Marshall's dissent*

Justice Marshall's analysis was substantively similar to the bifurcated position of Justice Brennan, although he went into far greater depth to explain the jurisprudential underpinning of his opinion. We do not here review Justice Marshall's exposition as to why proof of

intent is unnecesary in cases such as this. This is not because his opinion is lacking in philosophical appeal, but rather because, given the opinions of at least six members of the Court, it is quite clearly not the law by which the present case must be governed. With respect to the question of the proof necessary to establish the requisite intent to discriminate, Justice Marshall would impose a substantially different burden of proof on the plaintiffs than would the plurality. Justice Marshall rejects the plurality's position that the plaintiff must prove that "the decision maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979). Rather, Justice Marshall "would apply the common-law foreseeability presumption" 100 S.Ct., at 1538, to cases such as this. Applying his standard, "[t]he defendants would carry their burden of proof only if they showed that they considered submergence of the Negro vote a detriment, not a benefit, of the multi-member systems, that they accorded minority citizens the same respect given to whites, and that they nevertheless decided to maintain the systems for legitimate reasons." *Id.*

RECONCILING BOLDEN

There are certain principles that can be stated definitively after *Bolden*. A plaintiff bringing a voting dilution case attacking an electoral system that is racially

neutral on its face, may challenge such system on the grounds that it violates either the Fourteenth or Fifteenth Amendment. Though the plurality would limit the scope of the Fifteenth Amendment to those situations in which there was official action directly impinging the rights of Blacks to register or vote, that position did not command a majority. Three dissenting Justices specifically said the parameters of the Fifteenth Amendment encompasses voting dilution cases in which it is asserted that the system purposefully limits the access of Blacks to the political process. In his concurrence, Justice Blackmun agrees with the position taken by Justice White in his dissent, as to the substantive questions presented, and thereby becomes the fourth member of the Court to approve an expansive reading of the Fifteenth Amendment. In his concurrence, Justice Stevens explicitly states, ". . . I disagree with Mr. Justice Stewart's conclusion for the plurality [1373] that the Fifteenth Amendment applies only to practices that directly affect access to the ballot and hence is totally inapplicable to the case at bar."[28] 100 S.Ct., at 1509 n. 3. He also said, ". . . I am satisfied that such a structure [at-large systems] may be challenged under the Fifteenth Amendment as well as under the Equal Protection Clause of the Fourteenth Amend-

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28 In that same footnote, Justice Stevens points out that it is ". . . difficult to understand why, given this position [that the Fifteenth Amendment is inapplicable to cases such as the one at-bar], he [Justice Stewart] reaches out to decide that discriminatory purpose must be demonstrated in a proper Fifteenth Amendment case." 100 S.Ct., at 1509, n. 3.

ment. . . ." 100 S.Ct., at 1509. We conclude, therefore, that five Justices believe the Fifteenth Amendment creates a right of action in voting dilution cases.

An even less disputable principle, after *Bolden*, is that a plaintiff challenging an at-large voting system must prove that the system was created or maintained for the purpose of limiting the access of or excluding Blacks from effective participation in that system.

The question we return to is what type and how much evidence is required to establish proof of a discriminatory purpose. It seems to us that there are three possibilities.

The first possibility is that *Bolden* requires direct evidence of intent. We think this is incorrect. Not only does the plurality opinion say that the circumstantial evidence in *Zimmer* "may afford some evidence of a discriminatory purpose" 100 S.Ct., at 1503, common sense tells us that in a case such as this, in which it can not be asserted that the system was created for discriminatory purposes, it is likely that no plaintiff could ever find direct evidence that the system was maintained for discriminatory purposes. Clearly, the right to relief cannot depend on whether or not public officials have created inculpatory documents.[29] We must reject this first possibility.

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29 *See* note 8, *supra* and accompanying text.

The second possibility is that, while circumstantial evidence may suffice, the type of circumstantial evidence called for in *Zimmer* is inadequate to prove discriminatory purpose. We think this is the elusive area post-*Bolden*. Though four Justices were satisfied with the *Zimmer* criteria,[30] five Justices clearly rejected the *exclusive* use of those criteria as the means of inferring purpose or intent.[31] We conclude that they rejected the use of the *Zimmer* criteria to the extent that this Court, in *Bolden, presumed* the existence of a discriminatory purpose from the proof of some of those factors. We believe the Court rejected the use of such a quantitative weighing approach, requiring instead an independent inquiry into intent. Additionally, we think the Supreme Court was directing all courts making the inquiry to apply the *Zimmer* criteria only to the extent that they are relevant to the factual context at hand and, to the extent they are not so relevant, to employ other criteria. Finally, it appears that the Supreme Court has somewhat increased the burden of proof on plaintiffs in such cases. In *Zimmer*, this Court granted relief despite the factual conclusion that the police juries and

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30 Justice Blackmun agreed with the three dissenting Justices that the evidence adduced at trial was sufficient to prove discriminatory intent.

31 The plurality was joined in this position by Justice Stevens. It is essential to understand, however, that he rejects the use of the *Zimmer* criteria to draw an inference of intent, not because he believes such proof cannot establish discriminatory intent, but rather because he thinks the question of intent is irrelevant to the disposition of cases such as this.

school board in question were not unresponsive to the needs of the Black community. The Supreme Court implicitly concluded in *Bolden*, as we explicitly do today, that absent such proof of unresponsiveness a *prima facie* case can not be [1374] established. *Zimmer* has been rejected to the extent it holds otherwise. Thus, we make one exception to our earlier statement that proof of the *Zimmer* criteria is required only to the extent that they are relevant to the facts of a particular case. We believe, however, that this exception is well grounded in the conceptual framework that recognizes the Constitutional rights here involved. As has been stated before, the Fourteenth and Fifteenth Amendments protect the right to effective participation in the electoral process. Effective participation does not mean the right to have members of one's race, sex, or group elected to political office. What it does mean is that the system of government that serves the interests of the people must serve the interests of all the people; at least to the extent that one group's interests are not invidiously discriminated against. Therefore, a racially definable group may challenge an electoral system on dilution grounds only if it can be shown that the system invidiously operates to the detriment of their interests. Unresponsiveness is a necessary element to plaintiff's maintenance of an action such as this. Proof of unresponsiveness, alone, does not give rise to an inference that the system is maintained for discriminatory purposes. That conclusion must be reached only in light of the totality of the circumstances presented.

Appellant contends that, in light of *Bolden*, the use of the *Zimmer* criteria to draw an inference of intent is erroneous. Such a broad absolute reading of *Bolden* seems unwarranted and incorrect.[32] In *Bolden*, the Supreme Court specifically refers with approval to its decisions in *White v. Regester* and *Whitcomb v. Chavis*. The Court points out that, in *White*

> the Court relied upon evidence in the record that included a long history of official discrimination against minorities as well as indifference to their needs and interests of the part of white elected officials. The Court also found in each county additional factors that restricted the access of minority groups to the political process. In one county, Negroes effectively were excluded from the process of slating candidates for the Democratic Party, while the plaintiffs in the other county were Mexican-Americans who "suffer[ed] a cultural and language barrier" that made "participation in community processes extremely difficult, particularly . . . with respect to the political life" of the county. 412 U.S. at 768, 93 S.Ct. at 2340-41 (footnote omitted).

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32 *See United States v. Uvalde Consolidated Independent School District, supra*, note 9, in which this Court said, "We are convinced that the fundamental reasoning of our decision in *Bolden*, and its companion, *Nevett v. Sides*, 571 F.2d 209 (5th Cir. 1978), survives the Supreme Court's decision [in *Bolden*] intact." *Uvalde* at 582.

100 S.Ct., at 1501. Moreover, it is clear that the *Zimmer* criteria were gleaned from the Supreme Court's guidance in *White* and *Whitcomb*.[33] Finally, the plurality itself recognized that "the indicia relied on in *Zimmer* may afford some evidence of a discriminatory purpose. . . ." In our opinion, therefore, the use of the *Zimmer* criteria is sound to the extent that the inquiry focuses on the primary question of *discriminatory purpose*.

The third possible explanation for the Supreme Court's decision in *Bolden* is simply that the evidence adduced was insufficient to allow an inference of discriminatory purpose. We believe this was the most significant factor behind the Court's [1375] ruling.[34] After indicating that the factors enunciated in *Zimmer* could be indicative though not conclusive of discriminatory purpose, the Court said, "[t]he so-called *Zimmer* criteria upon which the District Court and the Court of Appeals relied were most assuredly insufficient to

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33 In his dissenting opinion in *Bolden*, Justice White points out that ". . . *Zimmer* articulated the very factors deemed relevant by *White v. Regester* and *Whitcomb v. Chavis* — a lack of minority access to the candidate selection process, unresponsiveness of elected officials to minority interests, a history of discrimination, majority vote requirements, provisions that candidates run for positions by place or number, the lack of any provision for at-large candidates to run from particular geographical subdistricts.
100 S.Ct., at 1518.

34 In *Uvalde*, *supra* note 9, Judge Rubin points out that ". . . the plurality's rejection of the fifteenth amendment and section 2 claims in *Bolden* may rest entirely upon the conclusion that no discriminatory motivation was shown." *Uvalde* at 582.

prove an unconstitutionally discriminatory purpose *in the present case.*" (emphasis added) 100 S.Ct., at 1503. The fact that such a weighing of the evidence was difficult and extremely close is reflected by the division of the Court.

THE RULE ESTABLISHED

A cause of action under the Fourteenth or Fifteenth Amendment asserting unconstitutional vote dilution through the maintenance of an at-large electoral system is legally cognizable only if the allegedly injured group establishes that such system was created or maintained for *discriminatory purposes.* A discriminatory purpose may be inferred from the totality of circumstantial evidence. An essential element of a *prima facie* case is proof of unresponsiveness by the public body in question to the group claiming injury. Proof of unresponsiveness, alone, does not establish a *prima facie* case sufficient to shift the burden of proof to the party defending the constitutionality of the system; responsiveness is a determinative factor only in its absence. The *Zimmer* criteria may be indicative but not dispositive on the question of intent. Those factors are relevant only to the extent that they allow the trial court to draw an inference of intent. The *Zimmer* criteria are not the exclusive indicia of discriminatory purpose and, to the extent they are not factually relevant in a given case, they may be replaced or supplemented by more

meaningful factors.[35] Even if all of the *Zimmer* and other factors are established, an inference of discriminatory purpose is not *necessarily* to be drawn. The trial court must consider the totality of the circumstances and ultimately rule on the precise issue of discriminatory purpose. Finally, given the reality that each case represents an extremely unique factual context for decision, this Court will give great deference to the judgment of the trial court, which is in a far better position to evaluate the local political, social, and economic realities than is this Court.

THE PRESENT CASE

The complaint in this action was originally filed in April, 1976. District Judge Alaimo's final order, including findings of fact and conclusions of law, was entered over two and one-half years later. The length of the pendency of the case was largely attributable to the extensive discovery conducted by both parties. At the conclusion of the non-jury trial, Judge Alaimo held for the plaintiff class, concluding that Burke County's system of electing county commissioners on an at-large basis had been maintained for the purpose of limiting the access of that county's Black residents to the electoral process.

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35 As we have indicated, the unresponsiveness criteria may not be replaced. Proof of unresponsiveness is an essential element to the maintenance of a claim such as this. It should be supplemented, of course, with such other criteria as may be relevant to the analysis of a given case.

Much ado has been made by appellants in this action about the fact that the District Court's order preceded the Supreme Court's decision in *Mobile v. Bolden.* Though this could make a difference in some cases, we do not find such timing controlling here. As we indicated earlier, the "new rule" established in *Bolden* appears to be an expansion of the principles earlier established in *Washington v. Davis* and *Village of Arlington Heights v. Metropolitan Housing Development Corp.* A court that correctly anticipated how the intent requirement in [1376] those cases would be applied to voting dilution cases, as in *Bolden,* could correctly interpret and apply the law, without the benefit of the Supreme Court's recent opinion. This is precisely the type of foresight demonstrated by Judge Alaimo in the present case. At the outset of his order, Judge Alaimo refers to this Court's treatment of *Washington v. Davis* and *Village of Arlington Heights v. Metropolitan Housing Development Corp.* in *Nevett v. Sides,* 571 F.2d 209, 221 (5th Cir. 1978), *cert. denied,* 446 U.S. 951, 100 S.Ct. 2916, 64 L.Ed.2d 807 (1980), and concludes that '. . . [a] demonstration of intention is necessary under both fourteenth and fifteenth amendments,' as a requisite to a finding of unconstitutional vote dilution. *Herman Lodge v. Buxton,* No. 78-3241, Findings of Fact and Conclusions of Law at 4 (S.D. Ga., Oct. 26, 1978) (hereinafter *Order*). It is clear, therefore, that Judge Alaimo employed the constitutionally required standard in his evaluation of the present case. We cannot affirm his judgment, however, unless and until we conclude that his analysis satisfies the rule we have established today.

To begin with, we note that the District Court's order was not defective for exclusive and unwarranted reliance on the *Zimmer* criteria. Though the court did consider those criteria it also evaluated the case in light of "other factors" set out by this Court in *Kirksey v. Board of Supervisors of Hinds County*, 554 F.2d 139 (5th Cir.) *(en banc), cert. denied*, 434 U.S. 968, 98 S.Ct. 512, 54 L.Ed.2d 454 (1977). In its order the District Court said, "It must be remembered that the Court is not limited in its determination to the *Zimmer* factors, rather the Court may consider the *Zimmer* factors, 'or similar ones.' *Kirksey v. Board of Supervisors of Hinds County*, 554 F.2d at 143. One 'similar factor' considered in *Kirksey* which did not seem to be an explicit primary factor in the *Zimmer* formula, is a depressed socio-economic status, 'which makes participation in community processes difficult.' *Id.*[36] This is an important factor and must be considered here." *Order* at 6. On the basis of these statements, as well as the District Court's detailed analysis of the *Kirksey* factors, we conclude that the District Court did not treat the *Zimmer* criteria as absolute, but rather considered them only to the extent they were relevant to the question of discriminatory intent.

The next step in our analysis is to determine whether the District Court properly made a finding of un-

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36 We think the District Court's consideration of this factor, in addition to those established in *Zimmer*, is particularly significant given how important the presence of a depressed socio-economic condition was to the Supreme Court's determination in *White v. Regester* that the at-large electoral system in Bexar County, Texas violated plaintiffs' Fourteenth Amendment rights.

responsiveness. As we indicated earlier, failure to find unresponsiveness precludes the maintenance of a voting dilution case. For the reasons set out below, we conclude that the District Court's finding of unresponsiveness was quite correct in the present case.

After considering exhaustive evidence on the subject, the Court found that the county commissioners demonstrated their unresponsiveness to the particularized needs of the Black community by: (1) allowing some Blacks to continue to be educated in largely segregated and clearly inferior schools; (2) failing to hire more than a token number of Blacks for county jobs, and paying those Blacks hired lower salaries than their White counterparts; (3) appointing extremely few Blacks to the numerous boards and committees that oversee the execution of the county government, particularly those groups, such as the committee overseeing the Department of Family and Childrens Services, whose function is to monitor agencies of the county government that work primarily with Blacks; (4) failing to appoint any Blacks to the judge selection committee, with respect to the appointment of a Judge for the Burke County Small Claims Court, despite the fact that most of the defendants in that court are Black; (5) making road [1377] paving decisions in a manner so as to ignore the legitimate interests of the county's Black residents;[37] (6) forcing Black residents to take legal

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37 As a typical example of the lack of concern that White county commissioners have for the interest of Burke's Black residents, the District Court pointed to the facts that

action to protect their rights to integrated schools and grand juries, and to register and vote without interference;[38] and (7) participating in the formation of, and in fact contributing public funds to the operation of, a pri-

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(1) The Mamie Jo Rhodes Subdivision, inhabited by Blacks is unpaved. It is directly across from a subdivision inhabited by Whites. The latter has paved roads. (2) Millers Pond Road is paved up to the pond, used by Whites; but from that point the road is unpaved, although that portion is inhabited by Blacks. (3) Paving on Hatchett Road ends at the residence of a White; yet Blacks live on the remainder of the unpaved road. (4) The streets of Alexander are paved in the section of town inhabited by Whites; but the roads in the black section are not paved. And (5) county road 284 is paved to the point where the last white lives, but beyond, where the road is inhabited by Blacks, the road is unpaved. It is of interest to note that the road to the dog trial field is paved even though trials are held but once a year. By contrast, there is still an unpaved road to a school. Although the last unpaved road to a white school was paved in 1930, it seems as if the road to the Palmer Elementary School, formerly an all-black school, and still predominately black, remains unpaved.

Order at 13-14. Our review of the evidence in this case leads us to the conclusion that these patent examples of discriminatory treatment by Burke's county commission typify the treatment received by Blacks in Burke County in every interaction they have with the White controlled bureaucracy.

38 Of particular significance, given the plurality position in *Bolden* that a Fifteenth Amendment violation occurs only when there is proof that the right to register and vote was *directly* impinged, is the District Court's finding that such overt conduct was taking place even at the time the present lawsuit was filed. The court said

> The county did, indeed, establish additional registration sites. But only after a pre-trial conference before and "friendly persuasion" by this Court. The defendants'

vate school established to circumvent the requirements of integration. We hold, not only was the District Court's finding of unresponsiveness not clearly erroneous, but that the county commissioners, acting in their official capacity, have demonstrated such insensitivity to the legitimate rights of the county's Black residents that it can only be explained as a conscious and willful effort on their part to maintain the invidious vestiges of discrimination. To find otherwise would be to fly in the fact of overwhelming and shocking evidence.

A second factor going to the question of discriminatory intent is the extent to which historical discrimination impacts on a minority group's *present* opportunity for effective participation in the electoral process.[39] On the basis of substantial evidence, the District Court

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tepidity was further demonstrated by the fact that a period of four months was required to get the registration cards to the new sites; and that the new sites were operative only a short while before the registration period ended. Admittedly, the County Commissioners recently approved a transportation system that should help solve access problems for some; but only after being prodded by the prosecution of this lawsuit. The Commissioners' sluggishness in this respect is another example of their unresponsiveness to the black members of the community.

Order at 14-15.

39 The focus of the District Court properly was on the *present* effects of discrimination. As the Supreme Court said in *Bolden*, ". . . past discrimination cannot, in the manner of original sin, condemn government action that is not in itself unlawful." 100 S.Ct., at 1503.

concluded that previous acts of official discrimination had a significant negative impact on the opportunity of Blacks in Burke County to exercise their right to so participate. We agree.

The District Court began by assessing the present impact on voter registration of the prior absence of Black suffrage. The Court said that until 1965, when the Voting Rights Act was adopted, Black suffrage was "virtually non-existent." At present, Black voter registration is approximately [1378] 38% of those eligible.[40] On that basis, the Court thought it reasonable to infer that "[t]he marked increase in the registration of Blacks following the enactment of the 1965 Voting Rights Act clearly indicates that past discrimination has had an adverse effect on Black voter registration which lingers to this date." *Order* at 7.

The Court considered next the fact of past and present bloc voting as it impacts the present ability of Blacks to participate in the electoral system. The evidence of such bloc voting was clear and overwhelming.[41] Of par-

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40 There was some conflict in the evidence as to the percentage of eligible Blacks who were registered to vote. Defendants asserted that the correct figure was 44%, while plaintiffs asserted that it was 38%. The District Court resolved the issue for plaintiffs, but indicated that either figure supported the conclusion it reached.

41 Of course, bloc voting is not illegal. Nonetheless, the Supreme Court and this Court have repeatedly recognized that voting along racial lines enhances the likelihood that those seeking to manipulate the electoral system for discriminatory purposes will succeed. It is for that reason that the inquiry into voting

ticular significance was the fact that in the one city election in which city councilmen were elected from single-member districts,[42] a Black was elected.

Inadequate and unequal educational opportunities, both in the past and present, as the result of official discriminatory acts, was another consideration important to the court. The evidence was clear that the relative percentage of Blacks who had attended high school, finished high school, or attended college was substantially less than the White residents of Burke County. On the basis of that evidence, as well as expert testimony, the Court concluded that ". . . one reason Blacks, as a group, have been ineffective in the political process, is the fact that they have completed less formal education." *Order* at 9.

Further evidence of the effective preclusion from participation in the electoral process, based on official conduct, was found in the past and present operation of the county's Democratic primary system and in the Georgia law making it more difficult for Blacks to serve as chief registrar in a county. The history of the Democratic Party Primary ranges from the "white primary",

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patterns is relevant. Like unresponsiveness, it is a factor of greater significance in its absence. A plaintiff would be hard pressed to prove that a system was being maintained for invidious purposes, without proof of bloc voting.

42 The election was from single-members districts, rather than at-large, pursuant to a court order. *See Sullivan v. DeLoach*, Civ. No. 176-238 (S.D. Ga., Sept. 11, 1977).

struck down in 1946, *Chapman v. King*, 154 F.2d 460 (5th Cir.), *cert. denied*, 327 U.S. 800, 66 S.Ct. 905, 90 L.Ed. 1025 (1946), to the present twenty-four member Burke County Democratic Executive Committee, of whom only one is Black. The present lack of participation was found to be the direct result of historical discrimination. Equally significant evidence of official present discrimination was found in Ga. Code Ann. §34-605, which states in pertinent part, "[n]o person shall be eligible to serve as chief registrar unless such person owns interest in real property. . . ." Given the testimony that significantly fewer Blacks than Whites are freeholders, the Court concluded that the statute operated to restrict Black participation in the electoral process.

On the basis of the evidence set out herein, as well as that of official discrimination in employment, paving, etc., as discussed earlier, the District Court concluded that the effect of historical discrimination was to restrict the opportunity of Blacks to participate in the electoral process in the present. That finding is not clearly erroneous, and, as with the unresponsiveness factor, we completely agree.

The third factor considered by the District Court was depressed socio-economic participation in the electoral process. The evidence on this point was both clear and disconcerting. Blacks suffer at the poverty level to a far greater proportionate degree [1379] than the White residents of Burke County. Over one-half of the

Black residents have incomes equaling three-fourths, or less, of a poverty level income. Seventy-three percent of all Black households lacked some, or all, plumbing facilities, as opposed to sixteen percent of the White households. Blacks in Burke County tend to be employed to a far greater degree in menial positions and, to the extent they have non-menial occupations, they are compensated at a level below their White counterparts. Finally, the court considered the blatantly inferior quality and quantity of education received by Blacks from the past to the present. On the basis of this evidence the Court concluded that Blacks in Burke County suffered from severe socio-economic depression, that such depression was caused, at least in part, by past discrimination, and that such depression has a direct negative impact on the opportunity for Blacks to effectively participate in the electoral process. That finding is not clearly erroneous.

The next factor considered by the District Court was lack of access to the political process.[43] On the basis of (1) the inability of Blacks to participate in the operation of the local Democratic party, and the effects thereof, (2) the County Commissioners' failure to appoint Blacks to local governmental committees, in meaningful numbers, and (3) the social reality that person-to-person relations, necessary to effective cam-

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43 The District Court considered evidence of actions by public officials and actions by private individuals or groups that could be manipulated by public officials to perpetuate a system whose purpose was the exclusion of Blacks.

paigning in a rural county, was virtually impossible on an interracial basis because of the deep-rooted discrimination by Whites against Blacks, the District Court concluded that historical and present discrimination operated in conjunction with the officially sanctioned electoral system to unfairly limit the access of Blacks to the political process. That finding is not clearly erroneous. Of particular significance to the District Court and to this Court is the manner in which the local Democratic party is operated, and the effects thereof. As the District Court correctly pointed out, "[e]lection in the [Democratic] primary is 'tantamount' to election to the office." *Order* at 19. Moreover, the local Democratic Executive Committee is empowered by state law to provide poll watchers, *Ga. Code Ann.* §34-1310(b), poll officers, *Ga. Code Ann.*, §34-501, and substituted nomination, *Ga. Code Ann.* §34A-903. The committee also elects delegates to be sent to the various political conventions. We think it clear that the ability to operate successfully in the framework of the existing Democratic party structure is one of the keys to electoral victory. Given the fact that only one of the committee's twenty-four members is Black, it becomes painfully clear that the existing electoral system could be purposefully used in conjunction with what must be viewed as the political reality in Burke County to continue the official and unofficial policy of excluding Blacks from participation in that system.

The last of the so-called primary factors considered by the District Court was the state policy behind the at-large election system. The Court stated that

> while [the policy is] neutral in origin, *it has been subverted to invidious purposes.* (emphasis added). Since it is a statute of local application, its enactment, maintenance or alteration is determined by the desire of representatives in the state legislature of the county affected. Burke's representatives have always been Whites. Accordingly, they have retained a system which has minimized the ability of Burke County Blacks to participate in the political system.

Order at 22. We hold that this finding of the District Court, based as it must be on his unique opportunity to assess the local political and social environment, is not clearly erroneous.

In addition to the primary criteria, the District Court considered a number of factors [1380] which this Court, as well as the Supreme Court, have indicated enhance the opportunity to use an electoral system for invidious purposes. The first factor is that the size of the questioned district is large. In that regard, the District Court pointed to the fact that "Burke County is nearly two-thirds the size of Rhode Island, comprising an area of approximately 832 square miles." *Order* at 22. The Court goes on to say that it "finds as a matter of law, that the size of the county tends to impair the access of Blacks in Burke County to the political process." *Id.* at 23. This being a conclusion of law, we are not restricted by a clearly erroneous standard.

Nonetheless, our independent analysis of this factor leads us to agree with the District Court's conclusion.

The second enhancing factor considered by the District Court was the majority vote requirement. The Court points out that, by the terms of the statute, "county commissioners are to run at-large, that the victor must be elected by a majority vote, *Ga. Code Ann.* §34-1513, and that candidates run for specific seats. *Ga. Code Ann.* §34-1015." *Order* at 23. The Court also noted that, though there is no anti-single shot provision, the requirement that candidates run for numbered posts has potential effects that are equally adverse. The District Court concluded that the presence of these factors enhanced the likelihood that the electoral system could be used for discriminatory purposes. This conclusion is sound and well supported.

The final factor considered by the District Court is the presence or absence of a residency requirement. Burke County has no residency requirement, despite the fact that candidates must run for numbered posts. As the District Court said, "[a]ll candidates could reside in Waynesboro, or in "lilly-white" neighborhoods. To that extend, the denial of access becomes enhanced." *Order* at 24.

Having concluded that all the relevant primary and enhancing factors were established in plaintiff's favor, the only question that remains is whether the District Court properly could have drawn an inference therefrom that the at-large electoral system in Burke

County has been maintained for the purpose of restricting the access of the county's Black residents to that system. As we indicated earlier, the trial court is to make its conclusion on the basis of the totality of the circumstances, not merely by measuring which party proved the presence of absence of the greatest number of factors. In making his judgment, Judge Alaimo did not have the benefit of the Supreme Court's decision in *Mobile v. Bolden*, nor, obviously, of our discussion of that case here. Nonetheless, a careful reading of Judge Alaimo's order leads us inescapably to the conclusion that he made the type of independent inquiry into the intent that we have said is necessary. Moreover, his order leaves no doubt as to his conclusion that the at-large electoral system in Burke County was maintained for the specific purpose of limiting the opportunity of the county's Black residents to meaningfully participate therein. At one point, for example, Judge Alaimo makes the unequivocal statement that, "[m]oreover, it is evident that the present scheme of electing county commissioners, although racially neutral when adopted, is being *maintained* for invidious purposes." (emphasis in original) *Order* at 7.

Judge Alaimo's evaluation of all the relevant evidence was thorough and even-handed. His conclusion that the electoral system was maintained for invidious purposes was reasonable, and in fact virtually man-

dated by the overwhelming proof. We affirm the District Court's judgment.[44]

THE RELIEF GRANTED

The District Court ordered that the five county commissioners for Burke County [1381] be elected from single-member districts in all future elections. The Court adopted the original plan submitted by the plaintiff, because it had substantially smaller population deviations among the districts than the plan submitted by the defendants. Such relief was proper.

At the outset, we note, as did the District Court, that there were no "special circumstances" that would justify an exception to the general rule that at-large districts are not favored.[45] Moreover, this is not a case like

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22 One question left unresolved by the various opinions in *Bolden* is whether the plaintiff must demonstrate that the system was maintained "because of not merely in spite of" its adverse effects, or simply establish that the adverse effects were the foreseeable consequences of maintaining the system. The plurality would require the former, whereas Justice Marshall, in dissent, indicated that the latter would suffice. We conclude that Judge Alaimo's order would satisfy either standard and, therefore, we specifically do not attempt to resolve that dispute. Moreover, we have a difficult time understanding the substance of the conflict. It seems to us that if a plaintiff establishes that a system was maintained for discriminatory purposes, he had *a fortiori* proven that it was maintained "because of" its discriminatory effects.

45 "We have made clear, however, that a court in formulating an apportionment plan as an exercise of its equity powers should, as a general rule, not permit multimember legislative districts. "[S]ingle-member districts

Mobile v. Bolden, in which an entire form of government was abandoned without consideration of the valid local interests in the maintenance of the existing system. In this case, unlike *Bolden*, the Court's order does not affect the existing allocation of executive and administrative responsibilities among the Burke County commissioners. Nor does the relief ordered require any other alteration in the operation of that governmental unit. In fact, the Court's order does not even change the number of county commissioners that are to be elected. This is another factor that distinguishes the remedy in *Bolden* from that ordered here.

We conclude that the remedy ordered is not only permitted, but, under the facts presented, it may be required. The picture that plaintiffs paint is all too clear. The vestiges of racism encompass the totality of life in Burke County. The discriminatory acts of public officials enjoy a symbiotic relationship with those of the private sector. The situation is not susceptible to isolated remedy.[46] While this Court is aware of its in-

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are to be preferred in court-ordered legislative reapportionment plans unless the court can articulate a 'singular combination of unique factors' that justifies a different result. *Mahan v. Howell*, 410 U.S. 315, 333, 93 S.Ct. 979, 989, 35 L.Ed. 320." *Connor v. Finch*, 431 U.S. 407, 415, 97 S.Ct. 1828, 1834, 52 L.Ed.2d 465."
100 S.Ct., at 1499.

46 The problems of Blacks in Burke County should not be viewed in a vacuum. The present treatment of Blacks in the South is directly traceable to their historical positions as slaves. While many individual political leaders have attempted to bring meaningful reforms to fruition, it is equally true that the White com-

ability to alter private conduct, we are equally aware of our duty to prevent public officials from manipulating that conduct within the context of public elections for constitutionally proscribed purposes. For all the reasons set forth herein, the judgment of the District Court is AFFIRMED.

HENDERSON, Circuit Judge, dissenting:

Although I can appreciate the monumental task of the district court in its articulation of findings of fact and conclusions of law, I am of the opinion that this case should be remanded for reconsideration in light of *City of Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980).

The constitutionality of the at-large voting system for county commissioners in Burke County, Georgia, has not been tested by the *Mobile* criteria. The majority opinion [1382] recognizes that the district court's decision was made without the guidance of *Mobile*, but it states that the inquiry into discriminatory intent

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munities, for the most part, have fought the implementation of programs aimed at integration with every device available. A District Court ordering relief in a case such as this must take cognizance of that fact. As a learned member of this Court recently recognized, ". . . if we, as judges, have learned anything from *Brown v. Board of Education*, it is that prohibitory relief alone affords but hollow protection from continuing abuse by recalcitrant governments. Facing this situation, judges have the option of either declaring that litigants have rights without remedies, or fashioning relief to fit the case." F. Johnson, *In Defense of Judicial Activism*, 28 *Emory L.J.* 901, 910 (1979).

actually undertaken by the trial court satisfies that standard.

Mobile does more than reaffirm the necessity for a showing of discriminatory intent, however. *Mobile* also abolishes the simple "aggregate of factors" approach of *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) aff'd. sub nom. *East Carroll Parish School Board v. Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 196 (1976), heretofore followed in this circuit. In its place, *Mobile* institutes a "totality of the circumstances" test in which the *Zimmer* factors still possess relevance but to varying degrees. Thus, past official discrimination is not to be treated as an "original sin" and unresponsiveness by elected officials is "relevant only as the most tenuous and circumstantial evidence of the constitutional invalidity of the electoral system under which they attained their offices." *City of Mobile v. Bolden*, 100 S.Ct. at 1503, 64 L.Ed.2d at 63.

Zimmer was not the sole measure by which the findings of fact of the district court were tailored. That order was gauged by a hybrid standard referred to as the *Zimmer-Kirksey* test. *Kirksey v. Board of Supervisors*, 554 F.2d 139 (5th Cir. 1977) instructs that depressed socio-economic status which hinders participation in community affairs signals a denial of access to the political process. *Kirksey v. Board of Supervisors*, 554 F.2d at 143. In the findings of fact of the district judge, depressed socio-economic status was accorded consideration equal to that given the *Zimmer* factors. Yet, the *Mobile*

plurality considers historical and social factors, apart from the discrimination generated by official state action, to be "gauzy sociological considerations [which] have no constitutional basis." *City of Mobile v. Bolden*, 100 S.Ct. at 1504 n. 22, 64 L.Ed.2d at 64 n. 22.

Mr. Justice Stevens joined the *Mobile* plurality decision to retain Mobile's commission form of government as constitutionally permissible. I find two policy considerations raised in his concurrence to be persuasive. Each notion counsels the judiciary to exercise restraint in voting dilution cases. First, at-large systems will always disadvantage one or more minority groups struggling for political power. Yet, the essence of democracy is majority rule and a voting structure must be judged by a standard that "allows the political process to function effectively." *City of Mobile v. Bolden*, 100 S.Ct. at 1509, 64 L.Ed.2d at 70. Second, the standard chosen cannot hold reprehensible all detrimental effects on an identifiable political group because such a test would invite a host of voting dilution cases sure to plunge the judiciary into a "voracious political thicket." *City of Mobile v. Bolden*, 100 S.Ct. at 1514, 64 L.Ed.2d at 75. Reading Mr. Justice Stevens' concurrence together with the plurality opinion leads me to conclude that before a court may intrude into local political processes, it must possess stronger evidence of invidious motivation than past social discrimination and economic deprivation.

An exposition of evidence more detailed than that made by the district judge in the *Mobile* case is seldom seen. *Bolden v. City of Mobile*, 422 F.Supp. 384 (S.D. Ala. 1976). Most of the evidence here is of a similar character. Yet in the eyes of the Supreme Court, the findings set forth in *Mobile* were insufficient to prove unconstitutional voting dilution because the data was not viewed in the proper perspective. The conclusions drawn from the evidence gathered below may suffer from the same infirmity. As I read *Mobile*, it demands emphasis on evidence of official state denial of equal participation in the slating and election process and eschews heavy reliance on socio-economic data. A remand for reassessment of the record evidence, together with additional evidence, if necessary, seems to be the appropriate course of action. For these reasons, I respectfully dissent.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

No. 78-3241

HERMAN LODGE, ET AL.,
Plaintiffs-Appellees,

versus

J. F. BUXTON, ET AL.,
Defendants,

RAY DeLAIGLE, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Georgia

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ON PETITION FOR REHEARING

(APRIL 8, 1981)

Before JONES, FAY and HENDERSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby granted as to the typographical errors.

ENTERED FOR THE COURT:

/s/ PETER T. FAY
United States Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

HERMAN LODGE, SHELLY COLEMAN, LIZZIE M. SAMS, K. C. CHILDERS, REV. DAVID NELSON, TALMADGE D. LODGE, WOODROW HARVEY, and LEVI CRAWFORD, individually and on behalf of all those similarly situated,

Plaintiffs,

versus C.A. No. 176-55

J. F. BUXTON, QUINTON ROGERS, ROY MARCHMAN and RAY HARPER, individually and as members of the Board of Commissioners of Roads and

Revenues for Burke County, and their successors in office; A. HOLLAND GNANN, OTTO B. JOHNSON, and WALL T. THOMPSON, Individually and in their official capacities as members of the Board of Elections for Burke County, Georgia, and RAY DeLAIGLE, Individually and in his official capacity as a member of the Board of Commissioners of Burke County,

Defendants.

Filed: September 29, 1978

ORDER

Following a bench trial lasting several days in this voting dilution case, the Court has come to the conclusion:

1. that the plaintiffs are entitled to prevail,

2. that the present members of the Board of Commissioners for Burke County have been elected in an unconstitutional election and shall be replaced by new commissioners elected in accordance with the election provided herein,

3. that Burke County shall be divided into five districts, in accordance with the map designed as Plaintiffs' Exhibit No. 300,

4. that the duly qualified voters of each such district shall elect one of its residents otherwise qualified

by Georgia law who may or may not be freeholders of such district as one of the County Commissioners of Burke County for the five-member commission,

5. that defendants shall open and accept qualifications for candidates for said positions commencing immediately and until 12:00 o'clock noon, October 16, 1978, (the qualifying fee shall be the same as otherwise provided by Georgia law in special elections for such position), and

6. that the election for said new commissioners shall be held at the same time as the General Election to be held in 1978 for the election of the Governor of the State and the members of the United States Congress from Georgia.

The individuals elected as Commissioners of Burke County pursuant to this Order shall serve for a period of two years, after which their successors shall be elected in 1980 for four-year terms, as otherwise provided by law.

This Order will presently be supplemented and supported by the entry of appropriate findings of fact and conclusions of law. The Court, because of other pressing business, has been unable to place its findings and conclusions in proper final form. Accordingly, the Court deemed it imperative to enter the instant Order so that the maximum amount of time could be accord-

ed the candidates to prepare for the election ordered herein.

The parties are directed to cooperate in technical aspects of holding said election so as to eliminate any unnecessary problems therein.

So Ordered, this 29th day of September, 1978.

/s/ ANTHONY A. ALAIMO
Chief Judge,
United States District Court,
Southern District of Georgia

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

(Number and Title Omitted)

Filed: October 26, 1978

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

This action for declaratory judgment was tried by the Court without a jury. The named plaintiffs and other

black residents[1] of Burke County, Georgia brought this action to challenge the existing method of selecting their five county commissioners,[2] charging the method

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1 This action was certified as a class action by the Court's Order of May 12, 1977. The certified class consists "of all black citizens of Burke County, Georgia."

2 The Board of Commissioners of Burke County, as presently constituted, derives from Georgia Laws of 1911, p. 390. According to Section 1 of that Act, the Board of Commissioners of Roads and Revenues for Burke County consisted of five persons elected by the qualified voters of the county, all to be elected at the same time. Candidates were required to be resident freeholders of the county for at least three years prior to the election and, in addition, had to attain at least 28 years of age and be eligible to election as a member of the General Assembly of the State.

The 1911 law was amended in 1929 by Georgia Laws of 1929, p. 548, to provide that the members of the County Commission be appointed by the Grand Jury of Burke County.

This law was in turn amended by Georgia Laws of 1931, p. 400, providing again that the county commissioners be elected by the qualified voters of the County. That Act requires that any candidate be a resident freeholder of the county for at least three years prior to election, and that property ownership requirement has been continued in the law to this date.

All five county commissioners in Burke County are elected at the same time and for terms of four years, so that there are County Commission elections only once every four years.

A majority vote is required for the nomination and election of any county commissioner, and county commissioners must run, both in primary and general elections for specific numbered posts. Neither of these practices was implemented in Burke County until they were imposed by general state law in 1964. *Ga. Code Ann.* §§34-1015 and 1513. (Defendants' Answer, ¶ 9).

The next regularly scheduled election for county commissioners in Burke County is November, 1980, with primaries to be held several months prior thereto.

No residency requirements, or subdistrict requirement exists for the election of individuals to the Burke County Commission.

unlawfully diluted the strength of their votes. Plaintiffs pray that the County be divided into single-member districts in order to eliminate the conditions producing the unlawful dilution. For the reasons that are set out below, the Court finds for the plaintiffs.

According to plaintiffs, Blacks are not and cannot be elected to the County Commission, or generally to other elected positions, because the "at-large" system in use minimizes and dilutes black voting strength. No Black has ever been elected to the County Commission, in spite of the fact that historically Burke County has more Blacks than Whites.[3] However, as defendants are quick to point out,

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3 The following is the population and percentage of population by race in Burke County between 1930 and 1970 according to plaintiffs' exhibits 59, 108, 109, 110, and 191, of which the Court takes judicial notice:

YEAR [*c]	TOTAL POPULATION	PERCENTAGE [*a] WHITE [*b]	BLACK
1975	10,700	42%	58%
1970	10,988	40%	60%
1960	20,596	34%	66%
1950	23,458	29%	78%
1940	26,520	25%	75%
1930	29,224	22%	78%

[*a] Percentage is to the nearest whole percent.

[*b] The "percentage white" figure includes a category labelled "foreign born white"; the greatest number in this group was 42, in 1930. After 1930, this statistic apparently was not kept.

[*c] The 1975 figures are a mid-census estimate taken from plaintiffs' exhibit 191.

> "[t]he Constitution does not demand that each cognizeable element of a constituency elect representatives in proportion to its voting strength. Even consistent defeat of a group's candidates, standing alone, does not cross constitutional bounds." (Citations omitted).

Nevett v. Sides, 571 F.2d 209, 216 (5th Cir. 1978) (hereinafter *Nevett II*). It is the plaintiffs' burden to go beneath the surface and show the Court, regardless of form, an unlawful voting dilution of constitutional dimensions "[b]y producing evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question. . . ." *Id.*

Plaintiffs' complaint alleges that the present method of nominating and electing the Board of Commissioners of Roads and Revenues for Burke County, including the use of numbered posts, majority vote, run-offs and elections at-large,[4] dilutes the relative strength of their vote in violation of the rights guaranteed them by the first, thirteenth, fourteenth, and fifteenth amendments of the Constitution. Plaintiffs also claim that Burke County's election system violated 42 U.S.C. §§1971, 1973, and 1983.

Although plaintiffs assert a statutory theory of relief, the Court does not reach the issues raised by this

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4 Of course, multi-member districts, or county-wide elections systems are not *per se* unconstitutional. *Fortson v. Dorsey*, 379 U.S. 433 (1965).

theory, only recently discussed in special concurrence by Judge Wisdom, in *Nevett II*, 571 F.2d at 231. Since the Fifth Circuit has not addressed this theory in an operative context, and since plaintiffs have presented a strong case with respect to the fourteenth and fifteenth amendments, the Court follows the test enunciated in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), *en banc, aff'd sub nom.; East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976) and *Kirksey v. Board of Supervisors of Hinds County*, 554 F.2d 139 (5th Cir.) *(en banc), cert. denied*, 46 U.S.L.W. 3354 (1977); recently described in *United States v. Board of Supervisors of Forrest County*, 571 F.2d 951, 953-54 (5th Cir. 1978), as a "multi-step inquiry."

Before describing and undertaking the "multi-step inquiry," the Court notes that the Fifth Circuit Court of Appeals recently decided in *Nevett II* that ". . . [a demonstration of intention] . . . is necessary under both fourteenth and fifteenth amendments," as a requisite to a finding of unconstitutional vote dilution, *Nevett II*, 571 F.2d at 221. Functionally, this added requirement has not changed the district court's task since "a finding of racially discriminatory dilution under the *Zimmer* criteria raises an inference of intent and, therefore, . . . a finding under the criteria satisfies the intent requirement. . . ." *Nevett II*, 571 F.2d at 217.

As stated above, "*Zimmer* and *Kirksey* have established a multi-step inquiry for determining whether a districting plan [or election system] unlawfully dilutes a

minority's participation in the political process. The testing seeks to determine whether the plan either is a racially motivated gerrymander or perpetuates an existent denial of access to the political process." *United States v. Board of Supervisors of Forrest County*, 571 F.2d 951, 953 (S.D. Miss. 1978). There is no question of a racial gerrymander involved here; rather, the question is whether the system perpetuates an existent denial of access to the political process. This question requires "that the court first investigate whether the minority community is presently denied access to the political process. *Zimmer* enumerates several tests to guide this investigation." *United States v. Board of Supervisors of Forrest County*, 571 F.2d at 953.

> "The court in *Zimmer* established two categories [of factors], one containing criteria going primarily to the issue of denial of access or dilution, the other containing inquiries as to the existence of certain structural voting devices that may enhance the underlying dilution. The 'primary' factors include: the group's accessibility to political processes (such as the slating of candidates), the responsiveness of representatives to the 'particularized interests' of the group, the weight of the state policy behind at-large districting, and the effect of past discrimination upon the group's participation in the election system. 485 F.2d at 1305. The 'enhancing' factors include: the size of the district; the portion of the vote

> necessary for election (majority or plurality); where the positions are not contested for individually, the number of candidates for which an elector must vote; and whether candidates must reside in subdistricts."

Nevett II, 571 F.2d at 217.

It must be remembered that the Court is not limited in its determination only to the *Zimmer* factors, rather the Court may consider the *Zimmer* factors, "or similar ones." *Kirksey v. Board of Supervisors of Hinds County*, 554 F.2d at 143. One "similar factor" considered in *Kirksey* which did not seem to be an explicit primary factor in the *Zimmer* formula, is a depressed socio-economic status, "which makes participation in community processes difficult." *Id.* This is an important factor and it must be considered here.

Finally, in order to succeed, plaintiffs need not demonstrate the existence of each of the primary factors, rather

> "[b]y proof of an aggregation of at least some of these factors, or similar ones, a plaintiff can demonstrate that the members of the particular group in question are being denied access."

Kirksey v. Board of Supervisors of Hinds County, 554 F.2d 139, 143 (S.D. Miss., 1977).

The Court will discuss the primary factors in Part I, enhancing factors in Part II, conclusion in Part III, and relief in Part IV.

I.

A.
HISTORY OF PAST DISCRIMINATION

The history of past discrimination is included as a factor in the dilution equation because the legacy of past discrimination may preclude a minority group's effective participation in the political process. The Court finds plaintiffs have produced sufficient evidence of past discrimination to demonstrate that they have been unfairly denied such effective participation. Moreover, it is evident that the present scheme of electing county commissioners, although racially neutral when adopted, is being *maintained* for invidious purposes. *Compare Bolden v. City of Mobile*, 571 F.2d 238 (5th Cir. 1978).

The first fact which plaintiffs have established demonstrating this element of the *Zimmer-Kirksey* recipe is a link between past discrimination and low black voter registration. Before enactment of the 1965 Voting Rights Act, Black suffrage in Burke County was virtually non-existent. As of December 19, 1962 only 427, or 6.5% of the eligible Blacks were even registered.[5]

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5 Plaintiffs' Request of Judicial Notice filed February 16, 1977, Exhibit "E".

Following the Act's passage and by August 31, 1967, Black voter registration increased to 2,760 or 41.8% of the eligible Blacks. Today, approximately 38% of the eligible Blacks are registered to vote in Burke County.[6] The marked increase in the registration of Blacks following the enactment of the 1965 Voting Rights Act clearly indicates that past discrimination has had an adverse effect on Black voter registration which lingers to this date.

There was a clear evidence of bloc voting the only time Blacks ran for County Commissioner. Obviously, this must be ascribed in part to past discrimination. There are three Militia Districts in which Blacks are in a clear majority, the 66th, 72nd and 74th.[7] In a fourth

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6 Plaintiffs claim the respective percentages of registered eligible voters are 38% Black and 62% White, while defendants claim there are 44% Black and 56% White. Either set of figures supports the Court's conclusion. Although there was some dispute about these figures, neither party challenged the 1970 census report on which the County Commission Election District Plan selected by the Court is based.

7 The Court finds the following to be a reasonably accurate estimate of the registered voters by race in each district, as of 1978.

Precinct	Black	White	Total
Waynesboro - 60-62 District	1,050	2,149	3,199
Munnerlyn - 61st District	44	50	94
Alexander - 63rd District	75	104	179
Sardis - 64th District	211	478	689
Keysville - 65th District	163	214	377
Shell Bluff - 66th District	167	82	249
Greenscutt - 67th District	49	215	264
Girard - 68th District	110	195	305
St. Clair - 69th District	29	26	55

district, the 69th, as of 1978, there were only a few more Blacks than Whites. One black candidate, Mr. Childers, won in the four black districts, losing in all of the others. The other black candidate, Mr. Reynolds, won in three of the black districts losing in all of the others.[8]

Similarly, in 1970 Dr. John Palmer, a white physician from Waynesboro, who opened the first integrated waiting room in Burke County, ran for County Commissioner. Generally, he was thought of as being sympathetic to black political interests. He was soundly defeated.

In the recent city council election in Waynesboro, the county seat, a Black was elected to the council for the first time in history. This event can be attributed to the high degree of bloc voting, and to the fact that the elected Black ran in a district with a high percentage of black residents.[9]

Precinct	Black	White	Total
Vidette - 71st District	52	112	164
Gough - 72d District	201	68	269
Midville - 73rd District	184	195	379
Scotts Store - 74th District	98	52	150
Total	2,433	3,940	6,373

8 Plaintiffs' Request for Admissions, filed June 5, 1978, Exhibits I-3 and I-4.

9 This was possible because this Court created single-member districts. *See Sullivan v. DeLoach*, Civil No. 176-238 (S.D. Ga.) Order entered September 11, 1977.

Past discrimination in education has also precluded effective black political participation. Burke County schools discriminated against Blacks as recently as 1968. *Bennet v. Evans,* Civil No. 1369 (S.D. Ga.), Order entered June 20, 1969. Plaintiffs' Exhibit 59. And there are still schools like Gough Elementary and Girard Elementary that remain essentially segregated. Plaintiffs' Exhibit 233. Moreover, the Court finds that, as a group, Burke County Blacks have completed less formal education than Whites. Of the 4,476 black inhabitants of the County over 25 years of age, 346 (7.7%) never attended high school, 247 (5.5%) finished high school, and 123 (2.7%) finished college; while of the 4,281 white residents of the same age, 83 (1.9%) never attended school, 661 (15.2%) finished high school, and 308 (7.1%) finished college.[10] Based on the testimony of experts, one reason Blacks, as a group, have been ineffective in the political process, is the fact that they have completed less formal education. The Court concludes that this condition is a direct result of the history of invidious discrimination in Burke County.

Past discrimination has also directly chilled the opportunity for Blacks' becoming involved in the Democratic Party Primary. The Court notes it was not until 1946 that the "white primary" was struck down in *Chapman v. King,* 154 F.2d 460 (5th Cir.), *cert. denied,* 327 U.S. 800 (1946). The Court also finds past discrimina-

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10 Plaintiffs' Supplementary Answer to Defendants' First Interrogatories, filed March 2, 1977, Exhibit "A".

tion has kept Blacks from becoming members of the Burke County Democratic Executive Committee. It was not until after this lawsuit was filed that the Executive Committee, which conducts the only party primary in the county, gained a Black as one of its twenty-four members.

The Court finds evidence of present discrimination unfairly precluding Blacks from effective political participation in the requirements established by *Ga. Code Ann.* §34-605, which states in pertinent part that "[n]o person shall be eligible to serve as chief registrar unless such person owns interest in real property. . . ." A reference to Plaintiffs' Exhibits 66-69 makes it readily apparent that significantly fewer Blacks than Whites are freeholders. The Court finds this is in part due to past discrimination, thus buttressing the Court's conclusion that Blacks are being unfairly precluded from participating in the political process.

Moreover, Burke County Blacks were compelled to turn to this Court to eliminate the existing racially discriminatory system of selecting Grand Jurors. *See Sapp v. Rowland,* Civil No. 176-94 (S.D. Ga.) Order entered May 20, 1977.

Without specifically reiterating the statistics on hiring, the Court finds that as a result of the lingering effects of past discrimination, the County's hiring pattern has been carried out in a manner detrimental to the black community, particularly when one compares

the number of Blacks hired to the number of Whites, or the salaries and positions they respectively hold.[11] The Court also notes that many of the Blacks employed by the county are not in fact paid by the county, but from federal fundings.

The Court finds that the effects of past discrimination has been a direct influence on the County Commissioners' failure to appoint more Blacks to the various committees and boards which oversee, or direct the execution of the county government. Without enumerating such committees and boards and the related statistics, the Court points to one symbolic example of the Commissioners' attitude in this respect. In appointing persons to serve on the Bi-Centennial Committee, the Commissioners appointed fourteen Whites and one Black.[12]

The Court also takes notice of Georgia laws demonstrating a discriminatory intent.[13] *See generally* Plaintiffs' Supplementary Answers to Defendants' First Interrogatories, filed June 25, 1976, Answer 1, for a history of racial discrimination in Georgia.

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11 Plaintiffs' Request for Admissions, filed June 5, 1978, Exhibit I-1. Defendants' Answers to Plaintiffs' First Interrogatories filed June 14, 1976, Exhibit "C".

12 Defendants' Answers to Plaintiffs' First Interrogatories, filed June 14, 1976.

13 Plaintiffs' Supplementary Answers to Defendants' First Interrogatories, filed June 25, 1976, Answer 1.

The Court also finds discrimination present in the form of a segregated laundromat's being operated within a few blocks of the county courthouse.[14]

The Court concludes, based on the evidence discussed above, plaintiffs have demonstrated ample evidence of present effects of past discrimination for the purpose of establishing this element of the *Zimmer-Kirksey* test.

B.
UNRESPONSIVENESS OF ELECTED OFFICIALS

Unresponsiveness to the needs of Burke County Blacks "may be proved by present evidence and by lingering effects of past discrimination." *United States v. Board of Supervisors of Forrest County*, 571 F.2d 951, 954-55 n. 6 (5th Cir. 1978) (*quoting from Kirksey*, 554 F.2d at 144-45).

While the County Commissioners have taken advantage of most federally funded programs which were designed to meet the needs of the disenfranchised, the Court finds the County Commissioners, as an elected body, have acted with an insensitivity to the particularized needs of the black community amounting to unresponsiveness. For instance, "lingering effects of past discrimination" still haunt the county courthouse; there is a "Nigger-hook" at the water fountain, and the

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14 Testimony of Ms. Sullivan and Plaintiffs' Exhibits 239-42.

toilet signs for "Coloreds" and "Whites" still appear through faded paint.

One of the important functions of the County Commissioners is to appoint people to the various boards and committees which oversee execution of the county government. *See* Section A above. Although Blacks may not be entitled to be represented on the boards or committees in proportion to their frequency in the general population, the rare appointment of Blacks amounts to nothing more than a token afterthought, or simply to meet federal guidelines. It is the Court's impression that Blacks of Burke County desire, and desperately need, to play a meaningful role in their local government; to be able to work within the system, rather than to be forced to attack it from without. The Commissioners have been singularly unresponsive to this need. This is particularly evident when one considers the racially unbalanced committee appointments. It is highlighted by the fact that Blacks are just beginning to break into the ranks of committees whose function is to oversee agencies of the county government that work principally with Blacks. As an example, it was not until recently that a Black was appointed to the committee overseeing the Department of Family and Children Services. The Commissioners' continued failure to view problems with racial impartiality as well as their unresponsiveness is shown by the procedures used to select the Judge for the Burke County Small Claims Court. That court was created at the request of the small, local merchants, the majority of whom are

White, to collect unpaid consumer debts. The judge selection process is of note here in that the Commissioners selected a committee to pick the Judge. However, they failed to appoint anyone to the committee who could fairly consider potential interests of defendants, most of whom are Black. The Court finds that much in the same manner that the Commissioners have been unresponsive in committee appointments, they have also been unresponsive in their hiring policies. Although the Commissioners do not hire everyone who works for the county, their policy sets the tenor for the county's hiring. As noted above in Section A, most Blacks hold lower paying jobs, and from the testimony, it appeared that the majority of Blacks employed by the county were paid with federal money, whereas white employees were usually paid from county funds.

The Commissioners have also shown unresponsiveness in the paving of county roads. Although the evidence in this regard was not presented with precision or complete clarity, the Court finds that the Commissioners' paving decisions have exhibited a racially discriminatory pattern, thus demonstrating unresponsiveness.[15] In particular, the Court notes the following: (1) The Mamie Jo Rhodes Subdivision, inhabited by Blacks, is unpaved. It is directly across from a subdivision inhabited by Whites. The latter has paved roads.

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15 In the main, for its conclusion on this point, the Court relies on the testimony of Messrs. Harvey, Hopper, Kitchens, Lodge, and Smith, in conjunction with Plaintiffs' Exhibit 279.

(2) Millers Pond Road is paved up to the pond, used by Whites; but from that point the road is unpaved, although that portion is inhabited by Blacks. (3) Paving on Hatchett Road ends at the residence of a White; yet Blacks live on the remainder of the unpaved road. (4) The streets of Alexander are paved in the section of town inhabited by Whites; but the roads in the black section are not paved. And (5) county road 284 is paved to the point where the last white lives, but beyond, where the road is inhabited by Blacks, the road is unpaved. It is of interest to note that the road to the dog trial field[16] is paved even though trials are held but once a year. By contrast, there is still an unpaved road to a school. Although the last unpaved road to a white school was paved in 1930, it seems as if the road to the Palmer Elementary School, formerly an all-black school, and still predominately black, remains unpaved. While the defendants point out instances where Whites were living on unpaved roads, and that they had recently paved "Lodge Circle" of primary benefit to one of the named plaintiffs, the Court finds plaintiffs have adequately demonstrated defendants' unresponsiveness in the form of their paving decisions.[17]

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16 Burke County is famous as a center for bird dog field trials.

17 There was also testimony about "political roads," *i.e.*, pork-barrel projects whereby the local state representative could bequeath a road to a political friend. According to defendants' testimony, the County Commissioners had little control over these roads. However, the Court still finds such "political roads" indicative of Blacks' lack of access to the system, since no witness could remember a Black who had been blessed with such a road.

The Court finds that once Blacks have made their needs known, the sluggishness, or bureaucratic "run-a-round" to which they repeatedly have been subjected amounts to unresponsiveness. As a result, Blacks have been forced outside the local government for relief. They went to the courts to seek school and Grand Jury integration (*see* Section A above), and to the streets to "agitate," as defendants have said, to get lighting at the Davis Park ball field. Outside pressure had to come to bear before the county budged.

The county did, indeed, establish additional registration sites. But only after a pre-trial conference before and "friendly persuasion" by this Court. The defendants' tepidity was further demonstrated by the fact that a period of four months was required to get the registration cards to the new sites; and that the new sites were operative only a short while before the registration period ended. Admittedly, the County Commissioners recently approved a transportation system that should help solve access problems for some; but only after being prodded by the prosecution of this lawsuit. The Commissioners' sluggishness in this respect is another example of their unresponsiveness to the black members of the community.

Another area in which the defendants have exhibited unresponsiveness has been in public education. This manifested itself in the form of conflicts of interest, if not outright breaches of the public trust. There was evidence that in the early sixties, when desegregation

of public schools was beginning to become an inevitable reality, the County Commissioners showed their colors by being among the incorporators of the all-white Edmund Burke Academy. There is more. The Commissioners then donated public funds to buy band uniforms for the private school's band, despite advice to the contrary by the county attorney.

The Court finds, based primarily on the defendants' continued failure to make Blacks a viable part of the county government, that the Commissioners, as a result of the lingering effects of past discrimination, have been unresponsive to plaintiffs' needs. The Court finds this factor must be included as part of the aggregate of factors to be considered in determining the existence of vote dilution.

The Court concludes that the insensitivity of defendants to the needs of the plaintiff class exists because of invidious racial motivations.

C.
DEPRESSED SOCIO-ECONOMIC STATUS

One of the factors the *Kirksey* court identified as being indicative of denial of access to political process is "a depressed socio-economic status." *Kirksey v. Board of Supervisors of Hinds County*, 554 F.2d 139, 143 (5th Cir. 1977).

The socio-economic status of Blacks in Burke County is clearly depressed.[18] According to Plaintiffs' Exhibits 66 and 67, of the 1,731 families in Burke County with incomes below the poverty level, 1,467 were Black and 274 were White. Given that Blacks are 60% of the population, there are approximately 25% more Blacks whose income is at a poverty level than should be expected. The picture looks even worse when one notices that nearly 53% of black families had incomes three-fourths, or less, of a poverty level income. The Court finds this is in part caused by past discrimination.

In *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Supreme Court stressed that the plainfiffs' lack of resources was one of the primary reasons for its holding. Admittedly, Goldberg was not a voting rights case, but the same careful consideration must be given by this Court to the factor of income because to more than half of the plaintiffs, the "need to concentrate upon finding the means for daily sustenance, in turn, adversely affects [their] ability to seek redress from . . . [the local]

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18 It appears that Burke County must be an undesirable place for Blacks considering the steady decrease in the county's black population. Between 1930 and 1970, Burke County's black population has decreased from 78% to 58% of the total population. Moreover, 99% of Burke County's Blacks were born in Georgia, while 24% of Burke County's Whites were born out of state. This exodus is probably tied, in part, to past discrimination, and present economic inequality between the races. Plaintiffs' Exhibits 59, 108, 109, 110, and 191.

bureaucracy." *Goldberg, supra* at 264.[19] To this end, the opportunity to cast an undiluted vote becomes indispensable. Accordingly, the Court is constrained to find, within the context of the *Zimmer-Kirksey* aggregate test, that the economic plight of a substantial majority of plaintiffs is tied to past discrimination, and is indicative of their lack of access to the political process. *See also Lubin v. Panish*, 415 U.S. 709 (1974).

In addition to a depressed economic status, Blacks in Burke County are subject to a depressed social status. Although there is no single indicia which the social scientists have identified as determinative of social status, some of the factors identified are present here. The first index to which the Court turns is education. Education, or the lack thereof, is an indicator of social status, and according to the experts, would influence the likelihood of a minority group's effective participation in the political process. Objective statistics show that Blacks have completed less formal education than Whites.[20] It appears without serious dispute that what education Blacks did receive was qualitatively inferior to a marked degree. Per capita spending for the education of black students was much less than for their white counterpart.[21] The Court finds that the un-

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19 The verity of this statement was supported by the testimony of both experts.

20 Plaintiffs' Supplementary Answers to Defendants' First Interrogatories, filed March 2, 1977, Exhibit "A".

21 Plaintiffs' Exhibit 278.

broken history of an inferior formal education has had and does now have a strong tendency to preclude Blacks' effective participation in the political process.

There is additional evidence which illustrates the fact that Blacks in Burke County have a depressed socio-economic status. When one examines Plaintiffs' Exhibits 64 and 65, he learns that Blacks tend to receive less pay for similar work, and that Blacks tend to have the more menial jobs. Housing for Blacks also tends to be inferior, according to Plaintiffs' Supplementary Answers to Defendants' First Interrogatories, filed June 25, 1976, Exhibit A. This exhibit depicts that 73% of the houses occupied by Blacks lacked some, or all, plumbing facilities, while only 16% of the houses occupied by Whites suffered the same shortcomings.

The Court must conclude that, unfortunately, Blacks in Burke County suffer a depressed socio-economic status due in part to the lingering effects of past discrimination.

D.
LACK OF ACCESS TO THE POLITICAL PROCESS

The political process, in a voting dilution context, has received both a literal and a broad interpretation. It not only has been interpreted to mean physical access to the voting and election processes, *i.e.*, "access of the individual to the ballot box or voting booth . . ." but also to include ". . . whether a group has input into the poli-

tical decision-making process . . . ." *Kirksey v. Board of Supervisors of Hinds County*, 554 F.2d 139, 143 n. 10. The Court finds that in the past, as well as in the present, plaintiffs have been denied equal access to the political process.

Prior to the passage of the Voting Rights Acts of 1965, Blacks in Georgia were unfairly denied access to the election processes by such devices as literacy tests, poll taxes, and white primaries.[22] Plaintiffs tried to demonstrate that the Georgia "purge law" (*Ga. Code Ann.* §34-624), was such a device,[23] and presently works an unfair denial of access on plaintiffs. The Court finds plaintiffs have failed to prove this theory for their failure to demonstrate adequately that more Blacks than Whites are purged; or that a two-year period is unduly restrictive towards Blacks. The Court makes this finding even though plaintiffs have successfully shown that Blacks, by virtue of their relatively severe degree of poverty, the size of the county (Part II, Section A below), and the absence of a public transportation system, are more likely than Whites to have a problem physically getting to the polling places where they may exercise their most fundamental of rights.

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22 Plaintiffs' Supplementary Answers to Defendants' First Interrogatories, filed June 25, 1976, Answer 1.

23 The 1976 Georgia Constitution still demands a literacy and "good character and understanding" test as a requisite for voting, although this provision is suspended by the 1965 Voting Rights Act.

Although plaintiffs here were unable to show a denial of access to specific voting processes, similar to the obviously eggregious denials in *Kirksey, i.e.*, disqualification of certain black candidates by the county election commission, or a conditioning of primary participation upon a pledge of party loyalty, the Court finds a denial of access, in part, caused by the lingering effects of past discrimination, in the virtual absence of Blacks on the Democratic Executive Committee. Defendants attempted to refute a potential finding of this nature by minimizing the role played by the Democratic Executive Committee in Burke County politics. Defendants pointed out that primary slating is open, and that the Executive Committee has never actively supported a candidate. These facts, however, must be viewed in a proper context rather than in a vacuum. The context demonstrates that by state law, the committee may provide poll officers, *Ga. Code. Ann* §34-501; poll watchers, *Ga. Code Ann.* §34-1310(b); and, substituted nominations, *Ga. Code Ann.* §34A-903. Election in the primary is "tantamount" to election to the office. The Executive Committee elects and sends representatives to the various political conventions. The Court concludes, therefore, contrary to defendants' urgings, that the Democratic Executive Committee does indeed play an important, albeit subtle, part in Burke County politics.

In addition to the tasks listed above, the Executive Committee is required by its national and state char-

ters to "insure full participation by all segments of society."[24] The lingering effects of past discrimination are highlighted by the fact that in spite of these affirmative action requirements, when the Committee recently designed a sub-district election scheme for the election of its twenty-four members, no Blacks were asked for their input to the plan.[25] The Court finds the lingering effects of past discrimination to be an important cause of a virtual "lilly-white" Democratic Executive Committee. This fact must be added into the sum producing the unfair exclusion of Blacks from the political process.

The Court also finds that the effects of past discrimination exclude Blacks from the personal contact politics of Burke County. Many of defendants' witnesses testified that success in Burke County politics is based on the number of friends one has. Defendants' witnesses stated this was the case because Burke County has a small population, so that most of its inhabitants know each other on a personal level. As a result there is little need for debate at election time for

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24 Article 9, Section 3, of Georgia Democratic Party State Charter. Plaintiffs' Exhibit 225.

25 It is more than interesting to note that the former and present commission members testified that the political division caused by a single-member district plan would create an unworkable County Commission. Yet, Mr. Thompson, himself, a former Commissioner and Chairman of the Democratic Executive Committee, admitted that even though the Executive Committee members were now elected by districts, this new system had not impaired the functioning of the Committee.

the Whites who have for centuries dominated the public scene. As is further evidenced by testimony of these witnesses, if the voter personally knows the candidate, he or she knows the candidate's political stance. When this factor is combined with the virtual segregation of all social, religious, and business organizations excepting that the only significant black-white relationships are on an employee-employer basis,[26] the result obtains that Blacks are shut out of the normal course of politics in this tightly-knit rural county.[27] This is not to say, however, that it is the Court's opinion that meaningful political dialogue, which fosters responsive action, cannot develop between an employee and employer. Rather, the Court notes and finds that the combination of factors discussed above, all of which seem to be related to past discrimination, operate unfairly to exclude Blacks from the normal course of personal contact politics in Burke County.

As a final factor to be considered in the Blacks' lack of meaningful input into the political process, the Court finds, as discussed above in Section B, that the Commissioners' failure to appoint Blacks to the committees and boards in sufficient numbers, or a meaningful fashion, is without doubt an unfair denial of access of input into the political process.

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26 Based on testimony and Plaintiffs' Exhibits 59-69, and in particular Exhibit 53.

27 This is especially true for poorer Blacks living in the more isolated areas of this large county.

While the denials of access in this case have not been especially blatant, the Court finds in the circumstances of this rural, tightly-knit, racially-separate society, that such denials, subtle though they may be, have operated unfairly to keep Blacks from meaningful political input.

E.
STATE POLICY BEHIND THE AT-LARGE ELECTION SYSTEM

The Court adopts the reasoning of Chief Judge Edenfield in *Pitts v. Busbee, Governor*, 395 F.Supp. 35, 39 (N.D. Ga. 1975), *remanded on other grounds*, 536 F.2d 56 (5th Cir. 1976), with respect to the finding that this factor is neutral.

But while neutral in origin, it has been subverted to invidious purposes. Since it is a statute of local application, its enactment, maintenance or alteration is determined by the desires of representatives in the state legislature of the county affected. Burke's representatives have always been Whites. Accordingly, they have retained a system which has minimized the ability of Burke County Blacks to participate in the political system.

II.
THE ENHANCING FACTORS

It appears that the "enhancing" factors have become part of the dilution "equation" for at least two reasons.

First, their existence is relatively easy to determine and, second, their effect on a minority group, though somewhat limited in comparison to the "primary" factors, is obvious.

As mentioned earlier, the *Zimmer* "enhancing" factors are: the size of the district; the portion of the vote necessary for election (majority or plurality); the number of candidates for which an elector must vote, where the positions are not contested individually; and whether candidates must reside in subdistricts. *Nevett II*, 571 F.2d at 217.

A.
DISTRICT SIZE

Burke County is nearly two-thirds the size of Rhode Island, comprising an area of approximately 832 square miles. The *raison d'etre* of this lawsuit is the fact that the district is undivided in any way. That is, it is as large as it can be in a relative sense. The geographic size has made it more difficult for Blacks to get to polling places or to campaign for office. There was no evidence to show that other counties in Georgia which have recently adopted single-member districts compare pejoratively to the "at large" counties in their ability to function. On the contrary, there was testimony by defendants' witness, Mr. Thompson, that the districting requirement for election to the Democratic Executive Committee has not impaired that organization's ability to function.

The Court finds, as a matter of law, that the size of the county tends to impair the access of Blacks in Burke County to the political process.

B.
MAJORITY VOTE REQUIREMENT

Defendants, in paragraph 9 of their answer filed April 4, 1976, admit that by the original act, county commissioners are to run at-large, that the victor must be elected by a majority vote, *Ga. Code Ann.* §34-1513, and that candidates run for specific seats, *Ga. Code Ann.* §34-1015.

As has been found by *Zimmer v. McKeithen*, 485 F.2d 1297 at 1306 (5th Cir. 1973), the majority vote requirement tends to submerge the will of the minority and to deny the minority's access to the system.

This Court finds that *Ga. Code Ann.* §§34-1015 and 1513 enhance plaintiffs' lack of access to the system.

C.
ANTI-SINGLE SHOT RULE

As in *Nevett II*, there is no anti-single shot voting provision. The candidates now run for numbered positions. However, this Court concludes, as did Judge Pointer in *Nevett II*, that the numbered position method has some of the same consequences as an anti-single shot, multi-member contest because a cohesive politi-

cal group, such as the Blacks here, is unable to concentrate on a single candidate.

D.
LACK OF RESIDENCY REQUIREMENT

The present system has no residency requirement. All candidates could reside in Waynesboro, or in "lilly-white" neighborhoods. To that extent, the denial of access becomes enhanced.

II.
CONCLUSION

The Court has considered each of the *Zimmer-Kirksey* primary and enhancing factors. It concludes that eight of the eleven factors are present, here, which were present in the recent finding of dilution by the Fifth Circuit Court of Appeals in *United States v. Board of Supervisors of Forrest County*, 571 F.2d 951 (5th Cir. 1978), that is, factors numbered 1, 2, 3, 5, 8, 10, and 11.[28] Since this

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28 Based on *Kirksey v. Hinds County*, 554 F.2d 139 (5th Cir. 1977), the court in *United States v. Forrest County*, 571 F.2d 951, 954 (5th Cir. 1978), found the following evidence constituted a successful claim of voting dilution:

1. no black had been elected to a county office;
2. retention of the poll tax as a requisite to voting until 1966;
3. retention of a literacy test until 1966;
4. conditioning of primary participation upon a pledge of party loyalty;
5. property requirements for candidates for supervisors;

is a dilution case founded upon " 'an intensely local appraisal of the design and impact of the [at-large] district in the light of past and present reality, political and otherwise,' " *Blacks United for Lasting Leadership, Inc. v. City of Shreveport*, 571 F.2d 248, 255 (5th Cir. 1978) [quoting from *White v. Regester*, 412 U.S. 755, 769-70 (W.D. Tex. 1973)], the Court follows the aggregate test of *Zimmer-Kirksey*.

The evidence on the lingering effects of past discrimination, from the "Nigger-hooks" on the courthouse to the segregated laundermat, is clearly established. The direct effect of past discrimination on access to the political process is demonstrated by bloc voting by the County's hiring practices, and, to a greater extent, the County's committee and board appointment practices. The Court also finds past discrimination has played a part in today's Black low voter registration. Past discrimination has also unfairly affected the quantity and quality of the education received by Burke County's Blacks in the same way it has affected their social status. In turn, their social status, as the experts stated, has had an adverse effect on their access to the political process.

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6. designation of the county for the use of federal voting registrars;
7. disqualification of certain black candidates by the county election commission;
8. effect of a lower socio-economic level upon the blacks' ability to participate;
9. a high rate of bloc voting;
10. various electoral mechanisms;
11. lack of responsiveness to the needs of black residents.

The Court concludes that defendants are heedless of the needs of the black community, whether it be in the Blacks' concern for the quality of education or the quantity of paving. The sluggishness with which the Commission moves in response to Black demands is well-nigh the equivalent of callous indifference to that class which has fallen heir to the evil of two centuries of discrimination. The Commissioners' lack of responsiveness is merely an extension of a culture which could view the vestiges of slavery with unseeing eyes. Such indifference attests to the Commissioners' realization of the Blacks' political impotence, both individually and collectively.

It is clear that Blacks in Burke County have a depressed socio-economic status, due in part to past discrimination. The fact that a substantial majority of Blacks have incomes of three-fourths, or less than, a poverty level income is an important factor with respect to access both to the machinery of the political processes, and to the social avenues of political access, each of which is most important in this tightly-knit, rural county.

As stated before, the Court finds Blacks have been overtly denied input into the political process by the Commissioners' failure to appoint Blacks to committees and boards in a meaningful fashion. While the above is the most blatant and pervasive denial of access which plaintiffs established, the Court finds another more subtle denial of access caused in great part by past

discrimination, and that is the proscription of black participation in the personal contract politics of Burke County Whites.

The only enhancing factor that the Court considers has a special bearing on the aggregate is the size of the district. The County is large and can reasonably be divided into districts. But more importantly, the Court finds the size of the County, in conjunction with the fact that its residents are not concentrated in the county seat, has an adverse effect on many of the plaintiffs' access to the political process.

In the aggregate, defendants' unresponsiveness is perpetuating the effects of past discrimination against plaintiffs, a group in a depressed socio-economic status, who have unfairly been denied a role in the political destiny of Burke County. Accordingly, the Court finds plaintiffs have shown a violation of the rights guaranteed them by the Fourteenth and Fifteenth Amendments. It is unnecessary to consider the complaints of violation of the First and Thirteenth Amendments.

IV.

RELIEF

In light of the Court's findings above, the Court orders, for purposes of electing the five County Commissioners for Burke County, that the County be divided into five districts as delineated in Plaintiffs' Exhibit 300.

Although various districting proposals were submitted, the Court finds plaintiffs' original plan to be superior to the others, including the similar plan submitted by defendants, because the population deviation among the districts is substantially less; *i.e.*, 2.3% as compared to 4% in the next best plan.[29]

The Court selects a five-district plan over a plan in which any member is elected at-large because no "special circumstances" [*Paige v. Gray*, 538 F.2d 1108, 1111 (5th Cir. 1976)], could be found which would justify such an exception in view of the testimony indicating the Chair has little added responsibility or authority in comparison to the other Commissioners.

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29 The following statistics show the breakdown of population of the districts in the plan selected by the Court as to race and voting age and percentage deviation by district:

District	Total Population	Black Population (%)	White Population (%)	% Deviation
1	3,736	2,899 (77.6)	837 (22.4)	+2.3
2	3,673	2,753 (74.9)	920 (25.1)	+0.5
3	3,595	1,914 (53.2)	1,681 (46.8)	-1.6
4	3,590	1,852 (51.6)	1,738 (48.4)	-1.7
5	3,661	1,570 (42.9)	2,091 (57.1)	+0.3

District	Voting Age Population	Black Voting Age Population (%)	White Voting Age Population (%)
1	2,048	1,482 (72.4)	556 (27.6)
2	2,029	1,407 (69.3)	622 (30.7)
3	2,115	987 (46.2)	1,137 (53.8)
4	2,112	947 (44.6)	1,175 (55.4)
5	2,217	803 (36.2)	1,414 (63.8)

The Court has considered defendants' request for a stay, but under the circumstances denied that request. There is ample time to overcome any administrative problems. The plan selected by the Court tracks existing Militia District lines to a great extent and should pose few problems in the conduct of the election. Moreover, on balance, the plaintiffs have the better of it. Further denial or postponement of the Blacks' right to participate fully and freely in the society of Burke County is not properly justified.

The foregoing findings and conclusions supplement the Order heretofore entered by the Court directing the election of the five Commissioners for Burke County at the same time as the general election, Tuesday, November 8, 1978.

So Ordered, this 26th day of October, 1978.

/s/ ANTHONY A. ALAIMO
Chief Judge, United States
District Court, Southern
District of Georgia

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

QUENTIN ROGERS, RAY DELAIGLE, ROBERT L. WEBSTER, CHARLES H. KITCHENS, AND THOMAS M. LOVETT, AS MEMBERS OF THE BOARD OF COMMISSIONERS OF BURKE COUNTY, GEORGIA, AND A. HOLLAND GNANN, OTTO B. JOHNSON AND WALL T. THOMPSON, AS MEMBERS OF THE BOARD OF ELECTIONS OF BURKE COUNTY, GEORGIA
APPELLANTS

VS: NO. 78-3241

HERMAN LODGE, SHELLEY COLEMAN, LIZZIE M. SAMS, K. C. CHILDERS, REV. DAVID NELSON, TALMADGE D. LODGE, WOODROW HARVEY AND LEVI CRAWFORD
APPELLEES

FILED: MARCH 25, 1981

NOTICE OF APPEAL

Notice is hereby given that appellants above named (defendants in the district court) hereby appeal to the

Supreme Court of the United States from the judgment of the United States Court of Appeals for the Fifth Circuit entered in this action on March 20, 1981, affirming the order and judgment of the United States District Court for the Southern District of Georgia, Augusta Division, entered September 29, 1978 (Findings of Fact and Conclusions of Law filed October 26, 1978), which declared unconstitutional an Act of the General Assembly of Georgia (Ga. Laws 1911, p. 380) providing for the election at-large of the five (5) members of the Board of Commissioners of Burke County, Georgia, ordered the terms of the five incumbents cut short, and ordered that a special election be held for the election of five (5) Commissioners from five, single-member districts pursuant to a plan devised by the district court.

This appeal is taken pursuant to 28 USCA 1254(2), Appellants having relied on a statute of the State of Georgia held unconstitutional as being repugnant to the Constitution of the United States by the District Court and the Court of Appeals.

The Clerk will please prepare a transcript of record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the entire record in this case.

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/s/ E. FREEMAN LEVERETT
E. FREEMAN LEVERETT
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ATTORNEYS FOR APPELLANTS

CERTIFICATE OF SERVICE

I hereby certify that I have served copy of the foregoing Notice of Appeal upon Mr. Robert W. Cullen, Georgia Legal Services Program, 133 Luckie Street, 8th Floor, Atlanta, Georgia 30303 and upon Mr. David E. Walbert, 1210 First National Bank Tower, Atlanta, Georgia 30303, Attorneys for Appellees, by mail, duly addressed and postage prepaid.

This March 24th, 1981.

/s/ E. FREEMAN LEVERETT
Attorney for Appellants